



Final Report to the Vermont Public Utilities Commission

Harvard Negotiation & Mediation Clinical Program

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Executive Summary

In 2016, Vermont's Act 174 Working Group tasked the Vermont Public Utility Commission (PUC) with incorporating facilitation and mediation into its processes, in order to promote increased ease of public participation. The PUC commissioned the Harvard Negotiation & Mediation Clinical Program (HNMCP) to recommend an Alternative Dispute Resolution (ADR) system that could be used in PUC cases.

Our Goals

Our recommendations aim to address core stakeholder interests and respond to the PUC's most pressing challenges as articulated by stakeholders. With this in mind, we recommend implementation of an ADR system focused on siting disputes. This system:

- Seeks to prevent disputes by focusing on outreach consultation and communication.
- Addresses disputes informally and early in the process, to avoid position entrenchment.
- Identifies disputes that would benefit from mediation and those that would not.
- Narrows the scope of the dispute, or resolves it altogether, before technical hearings.
- Reduces expenses and time spent by parties and the PUC in a dispute.
- Increases ease of citizen participation by simplifying the intervenor process.

Key Findings

Interests

Stakeholders expressed four key interests

1. All stakeholders feel **inclusivity** should be a priority in PUC processes.
2. All stakeholders would like to **reduce the process's cost, length, and complexity**.
3. Petitioners want to ensure all parties are **engaged** in ADR in good faith.
4. Public sector stakeholders are concerned with **transparency of the process**.

Tensions

Three additional Pairs of stakeholder interests are in tension with one another.

5. Petitioners, the PUC, and the PSD want to maintain the **rigorous analysis** of evidence, but intervenors want the process to be **more accessible** to the public.
6. There is a tension between stakeholders' desire for **consistency** in the process and their desire for **flexibility** in ADR mechanisms.
7. Stakeholders want the PUC to be **more involved** with the parties throughout the process, but stakeholders also do not feel the PUC is **neutral**.

Recommendations

Each recommendation described below should narrow the scope of the dispute and decrease the number of disputing parties. We recommend the PUC implement these recommendations as a unit, rather than in piecemeal.

Reaching the Public, Preempting Disputes

First, we recommend the PUC ensure, or at least strongly support, more comprehensive pre-filing community outreach by petitioners. Community outreach can resolve concerns of potential intervenors and prevent disputes over the project from arising.

Preliminary ADR & Mediation Screening

Furthermore, the PUC should replace its pre-hearing conference with a facilitated “screening” meeting, open to all parties. The facilitator should ensure matters suitable for mediation are mediated, and those unlikely to benefit from mediation proceed to hearings.

Benefitting from Joint Expertise

We recommend the PUC replace discovery with a joint fact-finding process, in which parties work together to determine what information is required to reach an agreement and then jointly hire an expert or experts to gather that information.

Mediating Disputes

Parties should engage in formal mediation to resolve any additional disputes. The mediator should be a neutral third party, not part of the PUC or PSD, and the timing and structure of this mediation should remain flexible, guided by the parties and the mediator.

Next Steps for the PUC

Before the PUC can implement a pilot program, the PUC will need to decide the identity of facilitators and mediators, whether ADR should be a mandatory or voluntary part of the process, and how any additional costs of ADR will be funded. Each option for these decisions will have different consequences for the PUC and parties to PUC cases.

Key Terms: Definitions & Explanations

Act 174 (S. 260): *Act 174* was passed in 2016, and is meant to improve the siting of energy projects.¹ It also established the Act 174 Working Group.

Act 174 Working Group: The Working Group was tasked with reviewing the current processes for citizen participation in Vermont Public Utility Commission proceedings. The mission of the Act 174 Working Group was to make recommendations to promote increased ease of citizen participation in those proceedings.²

Act 250: **Act 250** Vermont's land use and development control law. The Natural Resources Board administers the public, quasi-judicial Act 250 process, which guides the siting of non-energy developments. Act 250 provides ten statutory criteria, used to evaluate each development and subdivision application.³

Alternative Dispute Resolution (ADR): a collection of procedures, typically mediation and arbitration, used for the purpose of resolving disputes more efficiently and at a lower cost. When disputing parties utilize ADR methods, they can avoid expensive and time-consuming trials. ADR also encourages creativity, helps parties find practical solutions, and

¹ Energy Development Improvement Act, Act 174 (S. 260) of 2016, <http://legislature.vermont.gov/bill/status/2016/S.260> [accessed Dec. 1, 2017] [hereinafter "Act 174"].

² See "Act 174 Working Group," Vermont Public Utility Commission, <http://puc.vermont.gov/public-participation/act-174-working-group> [accessed Dec. 1, 2017].

³ See "Act 250: NRB Act 250 Database Search," Vermont Agency of Natural Resources, <http://anr.vermont.gov/planning/act250-section248-info/act-250> [accessed Dec. 1, 2017]; "Act 250 Program," Vermont Natural Resources Board, <http://nrb.vermont.gov/act250-program> [accessed Dec. 1, 2017]; "What Are the 10 Criteria?," Vermont Natural Resources Board, <http://nrb.vermont.gov/act250-permit/criteria> [accessed Dec. 1, 2017].

avoids the unpredictability involved with traditional dispute resolution mechanisms. The process usually results in improved communications between parties and is, therefore, better for ongoing relationships.⁴

Certificate of Public Good (CPG): “Any person, partnership, or association which desires to own or operate a business over which the Public Utility Commission has jurisdiction must petition the board for a CPG, which is a determination that the operation of a particular business will promote the general good of the state. In making its determination, the PUC considers factors such as the project’s economic benefit to the state, consistency with the utility’s least cost integrated plan, necessity to meet present and future need for services, and any issue relevant to the general good of the state. For an in-state facility, the PUC also considers environmental and land use siting criteria such as whether the proposal would have an adverse effect on aesthetics, historic sites, air and water purity, the natural environment, or public health and safety.”⁵

Conciliation: the ADR practice of “building bridges of communication between the parties, helping parties correct and clarify misconceptions about one another and their positions, and develop trust so that open and collaborative discussion can take place.”⁶

Distributed Generation: “refers to a variety of technologies that generate electricity at or near where it will be used, such as solar panels and combined heat and power. Distributed

⁴ “Alternative Dispute Resolution,” *ADR Primer*, International Institute for Conflict Prevention & Resolution, <https://www.cpradr.org/resource-center/toolkits/adr-primer> [accessed Dec. 1, 2017].

⁵ Vermont Legislative Council, *Vermont Energy Glossary*, <http://legislature.vermont.gov/assets/Documents/2018/WorkGroups/Senate%20Natural%20Resources/Energy/W~Aaron%20Adler~Energy%20Glossary~1-13-2017.pdf> [accessed Dec. 1, 2017].

⁶ Ari Peskoe, *Alternative Dispute Resolution at Public Utility Commissions*, <http://environment.law.harvard.edu/wp-content/uploads/2017/05/Alternative-Dispute-Resolution-at-PUCs-Harvard-Environmental-Policy-Initiative.pdf> [accessed Dec. 1, 2017].

generation may serve a single structure, such as a home or business, or it may be part of a micro-grid (a smaller grid that is also tied into the larger electricity delivery system), such as at ... a large college campus. When connected to the electric utility's lower voltage distribution lines, distributed generation can help support delivery of clean, reliable power to additional customers and reduce electricity losses along transmission and distribution lines."⁷

Facilitation: the ADR practice of improving lines of communication between parties. Unlike conciliation, where the third-party primarily seeks to encourage trust and dialogue between the parties, facilitation aims to resolve a particular dispute ... or otherwise engage the parties in discussion about the substance of a proceeding.⁸

Intervenor(s): a person, organization, or group with an interest in the case, who has become a formal party to the case. Before becoming an "intervenor," an interested party must make a "motion to intervene" and meets the criteria of intervention supplied by Commission Rule 2.209.⁹

⁷ "Distributed Generation of Electricity and its Environmental Impacts," United States Environmental Protection Agency, <https://www.epa.gov/energy/distributed-generation-electricity-and-its-environmental-impacts> [accessed Dec. 1, 2017].

⁸ Ari Peskoe, *Alternative Dispute Resolution at Public Utility Commissions*, *supra* at n.6.

⁹ See "Glossary of Terms," Vermont Public Utility Commission, <http://puc.vermont.gov/public-participation/frequently-asked-questions/glossary-terms> [accessed Dec. 1, 2017]; Vermont PUC, Rule 2.200: Procedures Generally Applicable (July 11, 1983), http://puc.vermont.gov/sites/psbnew/files/doc_library/2200-procedures-generally-applicable.pdf [accessed Dec. 1, 2017].

Joint Fact-Finding: An ADR practice where parties to a dispute work together to decide what information is needed to resolve the dispute; gather data, either themselves or by hiring mutually-agreed-upon experts; and jointly evaluate the results.¹⁰

Mediation: “an ADR practice wherein a neutral third party without decision making authority works with parties to help them reach a settlement. Unlike facilitators, evaluative mediators provide subject-matter expertise, but they do not wield that expertise by imposing settlement terms on the parties. Rather, at the request of the parties, a mediator may provide counsel on legal issues, suggest settlement terms, or advise on whether a proposed agreement is likely to be approved by the Commission. Like facilitators, mediators also oversee the process and attempt to move the parties efficiently through the mediation.”¹¹

Merchant Generator: A corporation, person, agency, or other legal entity or instrumentality that owns electric generating capacity and sells electricity in the competitive wholesale power market. Broadly, anyone that owns electrical generating capacity that is not net-metered or owned by a utility, including qualifying co-generators and small power producers, and other power producers without a designated franchised service area.¹²

Pro se: In legal situations, generally, one appearing *pro se* does so without formal legal representation.¹³ In the context of the PUC, an intervenor appearing *pro se* is a person or an entity that participates and represents their interest in a Commission case without retaining an attorney. When individuals appear *pro se*, they have the rights and responsibilities of

¹⁰ “Common Dispute Resolution Approaches,” Federal Energy Regulatory Commission, <https://www.ferc.gov/legal/adr/continuum/com-dra.asp> [accessed Nov. 24, 2017].

¹¹ Ari Peskoe, *Alternative Dispute Resolution at Public Utility Commissions*, *supra* at n.6.

¹² Vermont Legislative Council, *supra* at n.5.

¹³ “Pro Se,” *Black’s Law Dictionary*, <http://thelawdictionary.org/pro-se/> [accessed Dec. 1, 2017].

attorneys and must follow all applicable rules and procedures. If a *pro se* representative is unable to comply with obligations under Commission rules and Vermont law, the Commission has the authority to require the party to retain counsel.¹⁴

Public Involvement Plan (PIP): A written submission made by petitioners to the regulatory body. The PIP gives the petitioner space to outline their plans to engage the public throughout their application, and beyond. The New York Public Utility Commission currently requires petitioners to submit a PIP with each application.¹⁵

Public Service Department (PSD): “an agency within the executive branch of Vermont state government. Its charge is to represent the interests of the people of the state in cases before the PUC.”¹⁶ The PSD does not represent individual citizens, but rather represents the best interests of the general public, as a whole.

Quasi-Judicial body: a body that has “a partly judicial character by possession of the right to hold hearings on and conduct investigations into disputed claims and alleged infractions of rules and regulations and to make decisions in the general manner of courts.”¹⁷

Section 248: a Vermont law that requires developers to seek approval (a CPG) from the PUC before beginning site preparation or construction of electric transmission facilities,

¹⁴ “Glossary of Terms,” Vermont PUC, *supra* at n.9.

¹⁵ “Article 10 Law,” New York Board on Electric Generation Siting and the Environment, <http://www3.dps.ny.gov/W/PSCWeb.nsf/W/PSCWeb.nsf/All/D12E078BF7A746FF85257A70004EF402?OpenDocument> [accessed Dec. 1, 2017].

¹⁶ Vermont Legislative Council, *supra* n.5.

¹⁷ “Quasi-Judicial,” *Merriam-Webster Dictionary*, <https://www.merriam-webster.com/dictionary/quasi-judicial> [accessed Dec. 1, 2017].

electric generation facilities, and certain gas pipelines and associated infrastructure.¹⁸ Section 248 also provides some criteria that guide the PUC’s analysis as to whether or not a proposed site is legal.

Siting: private and public activities relating to planning, permitting, approvals for, and construction of private energy facilities at particular sites.¹⁹

Stakeholder(s): “one who is involved in or affected by a course of action.”²⁰

¹⁸ “Section 248 Procedures,” Vermont PUC, http://puc.vermont.gov/sites/psbnew/files/doc_library/section-248-procedures.pdf [accessed Dec. 1, 2017].

¹⁹ Susan Tierney, “Siting Energy Facilities in New England: What, Why, Where, and How,” *Energy and Climate Forum: Tufts University*, <http://environment.tufts.edu/wp-content/uploads/tierney.pdf> [accessed Nov. 19, 2017].

²⁰ “Stakeholder,” *Merriam-Webster Dictionary*, <https://www.merriam-webster.com/dictionary/stakeholder> [accessed Dec. 1, 2017].

Background & Context

In the summer of 2017, the Vermont Public Utility Commission (PUC) asked the Harvard Negotiation & Mediation Clinical Program (HNMCP)²¹ at Harvard Law School (HLS) “to assess current PUC contested-case procedures to determine where alternative dispute resolution tools may be beneficial, including a program requiring mediation in certain cases.” Between early-September and mid-December 2017, we, two HNMCP students, investigated the current form of the PUC’s contested case processes, especially the Section 248 siting case process. Our review of the Section 248 process was specifically focused on how the process currently invites or discourages citizen participation and how the PUC could promote the increased ease of citizen participation in those proceedings in the future. This report presents our findings and recommendations, and aims to aid the PUC as it works to effectively respond to the recommendations made in the Act 174 Working Group Report (described below). As this report is intended to be accessible to all readers, regardless of their level of familiarity with the PUC and its processes, the remainder of this section will provide an overview of relevant players in the PUC processes.

²¹ See Appendix 1 for a description of the identity and role of HNMCP.

The Interested Parties

*The Vermont PUC: Role & Processes*²²

The Vermont PUC is a quasi-judicial body, empowered to make court-like rulings on utilities regulation matters in a contested case system, with broad regulatory and supervisory responsibilities. Its administrative and regulatory powers are embodied in Title 30, Chapter 5 of the Vermont Statutes.²³ The PUC “reviews the environmental and economic impacts of proposals to purchase energy supply or build new energy facilities.”²⁴ This function is commonly referred to as “siting.” It also “supervises the rates, quality of service, and overall financial management of Vermont's public utilities: electric, gas, telecommunications and private water companies;... reviews rates paid to independent power producers; and oversees the statewide Energy Efficiency Utility Program.”²⁵ While the PUC has other regulatory and administrative functions, those described above are most relevant here.

Given that our recommendations target the PUC's siting powers, a brief overview of that process is necessary. The PUC reviews the siting of electric transmission facilities, electric generation facilities, and certain gas pipelines under Vermont law, Section 248 (30

²² The name “Public Utility Commission” was adopted on July 1, 2017. Previously, the PUC was known as the Public Service Board (PSB). The name change was inspired by a recommendation made by the Act 174 Working Group Report, which highlighted public confusion between the “PSB” and “PSD,” and suggested the PSB change its “name to the Vermont Public Utility Commission (in step with the rest of the country).” According to the PUC's website, the change in name meant to “more clearly reflects our existing statutory responsibilities” and “reduce confusion about the difference between us and the separate state agency known as the Public Service Department.” See “Name Change to Public Utility Commission!,” Vermont PUC, <http://puc.vermont.gov/> [accessed Dec. 1, 2017]; Act 174 Working Group, *Recommendations to Promote Increased Ease of Citizen Participation in PSB Proceedings* (Dec. 15, 2016), at p. 9, http://puc.vermont.gov/sites/psbnew/files/doc_library/recommendations-citizen-participation-report.pdf [accessed Dec. 1, 2017] [hereinafter “Act 174 Working Group Report”].

²³ 30 V.S.A. Ch. 5, <http://legislature.vermont.gov/statutes/chapter/30/005> [accessed Dec. 1, 2017].

²⁴ “About Us,” Vermont PUC, <http://puc.vermont.gov/about-us> [accessed Dec. 1, 2017].

²⁵ *Id.*

V.S.A. § 248), as well as under Act 174.²⁶ Section 248 provides procedural rules that guide the PUC’s siting review process. Section 248, alongside other statutes,²⁷ also provides criteria that the PUC must consider in determining whether a proposed site is acceptable.²⁸ The procedural steps followed in a Section 248 case are laid out in *Figure 1*.²⁹ These steps closely track the process followed in a court case.



Figure 1: Current Section 248 Process

²⁶ 30 V.S.A. § 248, <http://legislature.vermont.gov/statutes/section/30/005/00248> [accessed Dec. 1, 2017]; see also Act 174, *supra* n.1.

²⁷ Projects with elements of waste disposal must also be sited based on criteria for waste disposal laid out in 10 V.S.A. § 6086(a)(1)(B), <http://legislature.vermont.gov/statutes/section/10/151/06086> [accessed Dec. 1, 2017].

²⁸ See, e.g., 30 V.S.A. § 248(b)(1)(A), *supra* at n.26, for criteria on natural gas transmission lines.

²⁹ “Section 248 Procedures,” Vermont PUC, *supra* n.18.

Stakeholders

In supervising public utilities and reviewing impacts of energy development proposals, the PUC plays host to numerous stakeholders—those who are affected by the PUC’s decisions and actions. There are stakeholders within the **PUC itself**. Three Commissioners (one full-time Chairperson and two part-time Commissioners, appointed by the Governor for six-year terms),³⁰ as well as numerous case officers and staff,³¹ review and decide upon petitions and run daily Commission business.

Other state government entities that appear regularly before the PUC are also stakeholders. The **Public Service Department** (PSD) represents the public interest in utility cases before the PUC, working to ensure that all petitions optimally serve the public.³² As indicated by the structure of Vermont Statutes Title 30, Chapter 5, the PSD and PUC formerly comprised a single agency.³³ Following the disaggregation of their functions, the PSD was made a statutory party (an automatic party) in all Commission proceedings.³⁴ While the PSD is the most consistently active and engaged statutory party, other government agencies also appear before the PUC.

The **Agency of Natural Resources** (ANR) is a statutory party in many cases, tasked with providing evidence and recommendations on how a proposal may affect the use of natural resources in Vermont.³⁵ Depending on the scope and potential effects of a case, the

³⁰ “Who is the Commission and Types of Cases Handled by the Commission,” Vermont PUC, <http://puc.vermont.gov/public-participation/who-commission-and-types-cases-handled-commission> [accessed Dec. 1, 2017].

³¹ “Employee List,” Vermont PUC, <http://puc.vermont.gov/about-us/employee-list> [accessed Dec. 1, 2017].

³² In discussions with PSD leadership and other stakeholders, it was made clear that the PSD represents the “general public” interest, and not specific neighbors or intervenors. This is established in 30 V.S.A. § 217, <http://legislature.vermont.gov/statutes/section/30/005/00217> [accessed Dec. 1, 2017]. It should also be noted that while the PSD was formerly called the Department of Public Service, it recently changed its name to the PSD. “About Us,” Vermont PSD, http://publicservice.vermont.gov/about_us [accessed Dec. 1, 2017].

³³ 30 V.S.A. Ch. 5, *supra* at n.23.

³⁴ “Glossary of Terms,” Vermont PUC, *supra* at n.9.

³⁵ 30 V.S.A. § 248(a)(4)(E); (b)(5), *supra* at n.26; Vermont PUC, “Glossary of Terms,” *supra* at n.9.

Vermont Agency of Agriculture, Food and Markets and **Division of Historic Preservation** in the Agency of Commerce may request to be a formal party in a proceeding before the PUC.³⁶ At the level of local government, **regional planning commissions**³⁷ and **municipal selectboards** and/or **municipal planning commissions**³⁸ also appear before the PUC, representing the interest of a regional or municipal plan, in certain cases.

Non-governmental, private stakeholders are also involved in PUC proceedings. Cases are generally initiated when a **utility, developer**, or other person (a “**petitioner**”) files an application (a “petition”) to make some kind of change in the energy landscape.³⁹ For example, a utility or a small private developer (a “**merchant generator**”) may apply to construct new energy generation or transmission facilities. In this report, petitioner stakeholders are generally considered to be either “utilities” or “merchant generators.” Petitioners are also usually represented by **outside legal counsel**. These attorneys for petitioners are also considered to be stakeholders.

Finally, Vermont citizens and citizen groups are also stakeholders. This is especially true of citizens or groups directly affected by, or “with an interest in,” petitions. **Adjoining or host landowners**—who own land adjacent to, or upon which, a project may be built⁴⁰—may become formal parties in a case by requesting to “intervene.” **Non-governmental organizations** (NGOs) with an interest in a case have also requested “**intervenor**” status. These persons or groups may hire an **attorney**, or may also act as their own legal counsel, appearing *pro se*. These citizens and citizen groups are referred to as “**intervenors**.”⁴¹

³⁶ “Glossary of Terms,” Vermont PUC, *supra* at n.9.

³⁷ 30 V.S.A. § 248(a)(4)(G), *supra* at n.26.

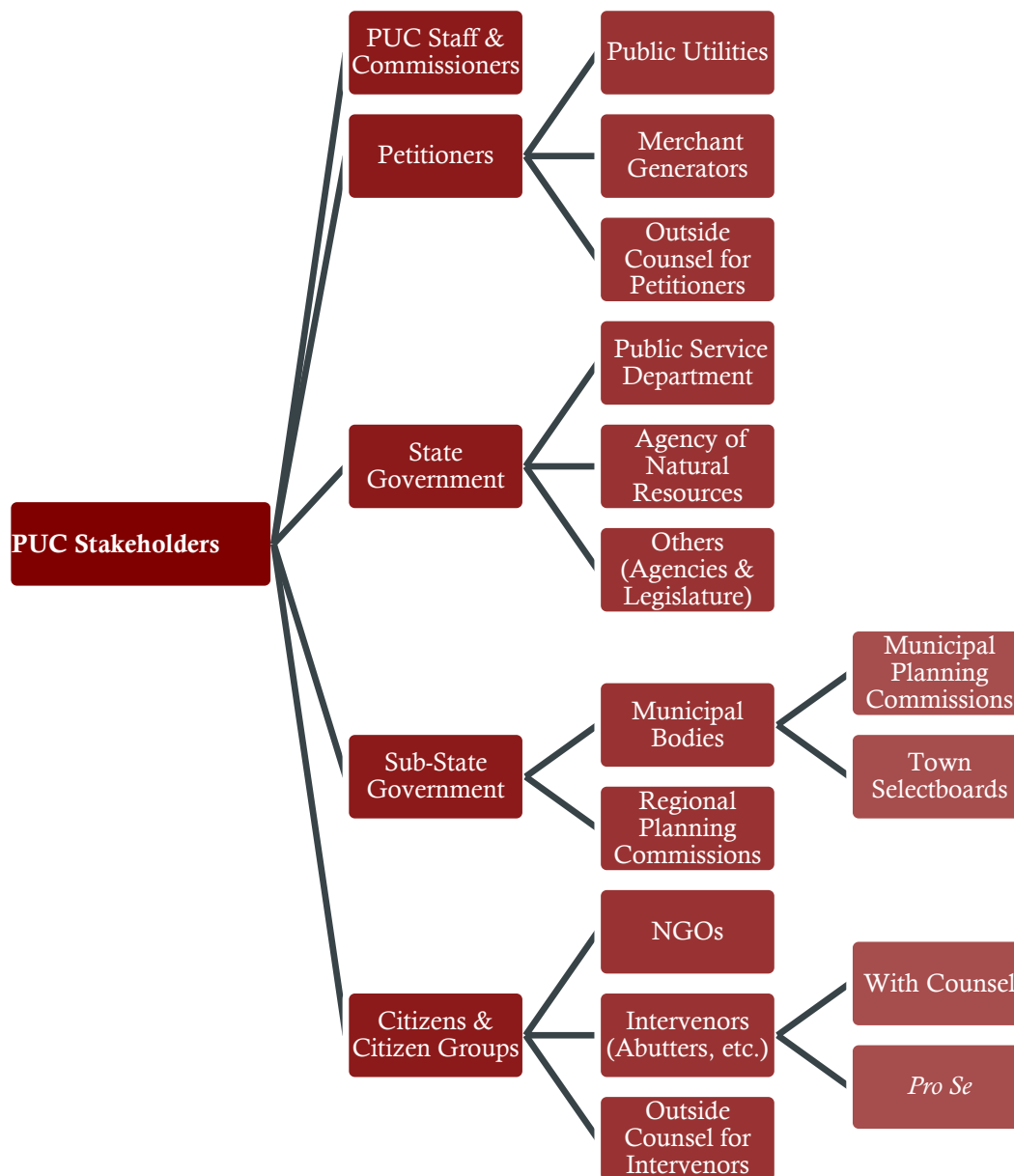
³⁸ 30 V.S.A. § 248(a)(4)(H), *supra* n.26.

³⁹ The PUC defines Petition and Petitioner: “the person or entity that files a request for Commission approval is the Petitioner; the request may be referred to as an application or a petition.” “Glossary of Terms,” Vermont PUC, *supra* at n.9.

⁴⁰ *Id.*

⁴¹ It should be noted that, while Vermont citizens may submit comments on a project, these comments “cannot be treated as ‘evidence’ in the case” but rather “raise issues that the Commission can ask the parties to the case

Figure 2: Stakeholders—Working With or Appearing Before the PUC



to address.” So, to shape the evidentiary record, interested citizens must make a motion to intervene formally in the case. *See id.*; “Introduction to Participating in Commission Processes,” Vermont PUC, <http://puc.vermont.gov/public-participation/introduction-participating-commission-processes> [accessed Dec. 1, 2017].

Vermont Energy Development: The Regulatory & Statutory Context

This report arose out of, and endeavors to address, a changing energy development and regulation atmosphere in Vermont. The changing atmosphere has been further influenced by recent legislative action, in the form of Act 174, which intended to improve citizen access in environmental and regulatory decision-making.

A Changing Landscape: Energy Development & Regulation in Vermont

The PUC has been made to re-evaluate its procedures as energy and utility development in Vermont, along with its regulation, has changed markedly in the past five or six years. In 2011, the Vermont Comprehensive Energy Plan announced that the state would endeavor to produce 90% of Vermont's energy from renewable sources by 2050.⁴² The Plan laid out a “comprehensive approach” to achieving its lofty goal.⁴³

According to PUC Commissioners and staff, applications for the development of renewable projects—solar and wind farms, especially—have greatly increased since the initiation of the 2011 Plan.⁴⁴ Applications for larger, community-based solar and wind projects have posed a particular challenge for the PUC.⁴⁵

⁴² Vermont PSD, “Vermont’s Energy Future (Volume 1),” *Comprehensive Energy Plan 2011*, http://publicservice.vermont.gov/sites/dps/files/documents/Pubs_Plans_Reports/State_Plans/Comp_Energy_Plan/2011/2011%20CEP_Volume%201%5B1%5D.pdf [accessed Dec. 1, 2017].

⁴³ This comprehensive approach centered on: (1) PSD-led development of “a roadmap for a whole-building approach to all-fuels efficiency”; (2) state-led innovation in producing a strategy to help local fuel dealers shift towards renewable energy; (3) funding and financing through “utility on-bill payment of customer energy improvements” and implementation of “a strategy for using a portion of Vermont’s Qualified Energy Conservation bond allocation for leveraging energy improvement financing”; and (4) fostering of public awareness by providing state support for “the ethic of conservation and efficiency in all sectors.” *See id.*

⁴⁴ Per interviews with PUC Commissioners and case officers.

⁴⁵ While smaller, backyard or rooftop solar projects may previously have caused headaches in the past, the PUC has begun reviewing these ‘household’ projects more efficiently, under an expedited procedure provided by Section 248(j). *See* “Siting Cases of Limited Size and Scope (Section 248(j)),” Vermont PUC, http://puc.vermont.gov/sites/psbnew/files/doc_library/section-248j-procedures.pdf [accessed Dec. 1, 2017].

In interviews, PUC staff, Commissioners, and others intimately familiar with the PUC, stated that the Commission and its court-like contested case process were established to deal with large-scale, traditional utilities. Unlike petitions for large-scale projects made by utilities, petitions for smaller renewable developments seem to be:

- more numerous, causing PUC staff to be stretched thin by the volume of work;
- made by petitioners without years of experience before the PUC, resulting in frustration and confusion amongst all parties;
- effecting neighboring landowners in a manner similar to large scale transmission projects, so that a number of parties become involved; and
- inordinately time- and resource-consuming relative to the cost and energy impact of the proposed project.

Our recommendations aim to address the unique challenges arising out of this changing energy development environment.

Act 174 & The Act 174 Working Group

The PUC is also adapting its processes following the Vermont General Assembly's passage of Act 174 (S. 260) in 2016.⁴⁶ Act 174 arose from the 2013 report of the Energy Generation Siting Policy Commission, which focused on improved "siting approval of electric generation projects, and ... public participation and representation in the siting process."⁴⁷ While the Act itself mainly intended to establish "a new set of municipal and regional energy planning standards,"⁴⁸ it also created a Working Group. Under the statute, the Working Group was to be comprised of: (1) a member of the PUC; (2) the Commissioner of Public Service; (3) a Vermont judge; (4) a House member of the Joint

⁴⁶ Act 174, *supra* n.1.

⁴⁷ Vermont PSD, *Comprehensive Energy Plan 2016*, at p. 20, https://outside.vermont.gov/sov/webservices/Shared%20Documents/2016CEP_Final.pdf [accessed Dec. 1, 2017].

⁴⁸ "Act 174 Recommendations and Determination Standards," Vermont PSD, <http://publicservice.vermont.gov/content/act-174-recommendations-and-determination-standards> [accessed Dec. 1, 2017].

Energy Committee; and (5) a Senate member of the Joint Energy Committee.⁴⁹ Numerous stakeholders expressed disappointment and frustration that a Working Group investigating citizen access to the PUC failed to include even one citizen working outside of the executive, legislative, or judicial branch of government.

The Act 174 Working Group's main task was to "review the current processes for citizen participation in [PUC] proceedings and... make recommendations to promote increased ease of citizen participation in those proceedings."⁵⁰ The Working Group's subsequent report contained numerous "Recommendations to Help Citizens Navigate [Commission] Processes."⁵¹ Of these recommendations, three in particular focus on the implementation of Alternative Dispute Resolution (ADR) processes by the PUC. These recommendations were:

- "Have Board staff act more often as mediators, for example by conducting a status conference part-way through the case to try to narrow the issues
- Explore developing a pilot program for mandatory mediation in controversial cases
- Find opportunities to move contentious issues out of contested-case procedures to rulemakings where the public can participate more easily and informally."⁵²

This report also forms part of the PUC's investigation into how these recommendations, or actions substantively similar to them, could best be implemented.

⁴⁹ Act 174 § 15(a)(1–5), *supra* n.1.

⁵⁰ Act 174 § 15(a–b), *supra* n.1.

⁵¹ Act 174 Working Group Report, *supra* n.22, at 7–8.

⁵² *Id.*

The Purpose & Scope of this Project

This report is meant to inform and advise the PUC as it moves to “promote

Our Purpose:

To advise the PUC on the implementation of Alternative Dispute Resolution processes in Section 248 siting disputes, thereby easing citizen participation and facilitating more efficient, less costly dispute resolution.

increased ease of citizen participation” through the adoption of ADR processes.⁵³ An effective ADR system must be responsive to the interests and priorities of stakeholders, implementable in practice, and in line with sound ADR theory and best practices. As such, this report has endeavored to account for the interests of all stakeholders, while taking into account the changing energy development environment and the Act 174 Working Group Report, described above.

More specifically, this report is aimed at addressing PUC cases that are most likely to be resolved using ADR. After considering the various kinds of cases addressed by the PUC—ratemaking, large-scale siting of transmission lines or gas lines, small-scale or localized siting of renewable projects—we have determined that localized siting of renewable energy projects seems most amenable to ADR at this time. This is because:

- the number of parties and potential intervenors are usually smaller than in large-scale siting;
- the opposition to the project is not necessarily intractable or ideological, but based on placement or aesthetics that can be resolved through party-to-party negotiation, facilitated dialogue, and/or mediation; and
- the PUC has been challenged to keep pace with the increased volume of localized renewable siting cases, and could benefit from the cost-effective and efficient resolution of these matters.

As such, the recommendations laid out below will focus on bringing an ADR system to localized siting of renewable energy projects. These recommendations will thus be made

⁵³ Act 174 § 15(a–b), *supra* n.1.

with reference to the legal siting process established in the law guiding the siting review process, Section 248.⁵⁴ Even so, it is anticipated that the processes described below could be scalable, and applied to regional or statewide siting cases, as well as ratemaking and other cases.

⁵⁴ Section 248 is explained in a step-by-step guide recently published by the PUC. *See* “Section 248 Procedures,” Vermont PUC, *supra* n.18. The full text of Section 248 can be found at <http://legislature.vermont.gov/statutes/section/30/005/00248> [accessed Dec. 1, 2017].

Research Methodology

The findings and recommendations of this report are founded upon qualitative research performed from mid-September to late-November, 2017. The research took the form of:

- telephone and written interviews with PUC stakeholders;
- first- and second-hand observation of PUC hearings;
- investigation of best practices employed by utility regulatory and energy siting bodies in other jurisdictions in the United States and Canada; and
- review of leading ADR theory and discussions with leading ADR and administrative law experts.

Interviews

We carried out telephone and written interviews with representatives from all of the stakeholder groups listed above. From September–November 2017, we contacted about 50 stakeholders via email, requesting their input. Thirty-four stakeholders responded to grant an interview. The chart below shows the quantity of interviews performed with each stakeholder group:

Table 1: Interviewees

Group	PUC	PSD	Utility	Merchant Generator	Petitioner Counsel	Region	Town	Intervenor	Intervenor Counsel	Senator
#	4	2	2	3	5	4	2	9	2	1

Interviews were conducted by us, and structured as free-flowing conversation, even though a general script was used as a guide.⁵⁵ All interviewees were asked substantially identical questions about:

- what the PUC has been doing well and what could be improved;

⁵⁵ See Appendix 3 for the full text of our interview protocols.

- whether ADR could work in contested cases; and
- how that ADR system may be structured.

Follow-ups were conducted over email as needed. Interviewees will be identified as members of the stakeholder group with which they are best associated, rather than by their name or organization.

Observation of Hearings

We observed a ratemaking investigatory hearing in the PUC hearing room in Montpelier, Vermont on October 17, 2017. We also watched portions of filmed siting hearings and proceedings found on Vermonters for a Clean Environment's YouTube channel, "Ver Mont."⁵⁶

Best Practices Research

During the first two weeks of November, we investigated the processes by which government bodies, in Vermont and in other states and jurisdictions, regulate public utilities and site energy developments. We compared the PUC's contested case process with that employed by Vermont's Natural Resource Board in land use decisions under Act 250.⁵⁷ We also investigated the procedures used by the Environmental Division of the Vermont Judiciary.⁵⁸

Moving outside of Vermont, we visited the official government website of each functioning state public utility commission, public service board, or other energy siting

⁵⁶ "Videos," Ver Mont,, <https://www.youtube.com/user/vtce> [accessed Dec. 1, 2017].

⁵⁷ "Welcome to the Natural Resources Board," Vermont NRB, <http://nrb.vermont.gov/> [accessed Dec. 1, 2017].

⁵⁸ "Environmental Division," Vermont Judiciary, <https://www.vermontjudiciary.org/environmental> [accessed Dec. 1, 2017].

authority, in the various states of the United States.⁵⁹ While Vermont's PUC handles both traditional siting matters and smaller siting matters, most other states employ different bodies to deal with each of these tasks. This meant that, for many states, we visited the websites of two or three different bodies.⁶⁰ Thereafter, we consulted materials on the website of the Federal Energy Regulatory Commission (FERC), and other federal bodies.⁶¹ Finally, we investigated the processes used by similar regulatory and siting bodies in the Canadian provinces of Alberta, British Columbia, Ontario, Quebec, and Saskatchewan.⁶²

In all, we visited the sites of over 95 regulatory bodies in different jurisdictions. At each site, we mined for information on public participation, intervenor support, and alternative dispute resolution processes. Useful information on other government bodies using ADR was rare. Some states did use ADR, but only for specific matters such as interconnection disputes between two utilities.⁶³ The most promising information came from California's PUC (CPUC),⁶⁴ New York's Siting Board,⁶⁵ FERC's Dispute Resolution Service,⁶⁶ and Alberta's Energy Regulator.⁶⁷ The CPUC was especially helpful: we were able

⁵⁹ Edison Electric Institute, *State Generation & Transmission Siting Directory* (Oct. 2013), http://www.eei.org/issuesandpolicy/transmission/Documents/State_Generation_Transmission_Siting_Directory.pdf [accessed Dec. 1, 2017]. See Appendix 2 for more information.

⁶⁰ See, e.g., "Department of Natural Resources," State of Alaska, <http://dnr.alaska.gov/> [accessed Dec. 1, 2017]; "Alaska Energy Authority," State of Alaska, <http://www.akenergyauthority.org/> [accessed Dec. 1, 2017]; Regulatory Commission of Alaska, <http://rca.alaska.gov/RCAWeb/home.aspx> [accessed Dec. 1, 2017].

⁶¹ "Alternative Dispute Resolution," Federal Energy Regulatory Commission, <https://www.ferc.gov/legal/adr.asp> [accessed Dec. 1, 2017].

⁶² See Appendix 2.

⁶³ See, e.g., Arizona, which employs mediation in "interconnection agreements" under: AZ Admin. Code Tit. 14, Ch. 2, R14-2-1501 (Art. 15), http://apps.azsos.gov/public_services/Title_14/14-02.pdf [accessed Dec. 1, 2017].

⁶⁴ "Alternative Dispute Resolution Program," California Public Utilities Commission, <http://www.cpuc.ca.gov/adr/> [accessed Dec. 1, 2017].

⁶⁵ "Siting Board Home," New York Board on Electric Generation Siting and the Environment, <http://www3.dps.ny.gov/W/PSCWeb.nsf/All/1392EC6DD904BBC285257F4E005BE810?OpenDocument> [accessed Dec. 1, 2017].

⁶⁶ "Dispute Resolution Services (DRS)," Federal Energy Regulatory Commission, <https://www.ferc.gov/about/offices/oaljdr/drs.asp> [accessed Dec. 1, 2017].

to discuss the CPUC's ADR program with Administrative Law Judge Kimberly Kim, the Commission's Alternative Dispute Resolution Program Coordinator and an Advising Judge to the Docket Office.⁶⁸ Best practices from these jurisdictions will be discussed in the recommendations section, below.

ADR Theory

In developing its findings and recommendations, we consulted with leading experts in the field of administrative law, utilities regulation, and ADR. We spoke with two experts from Harvard Law School's faculty: Professor Jody Freeman,⁶⁹ and Lecturer Ari Peskoe.⁷⁰ We also interviewed two ADR experts who are working in private practice: Dr. Jonathan Raab, of Raab Associates,⁷¹ and Ms. Stacie Smith of the Consensus Building Institute.⁷²

Beyond interviewing experts, we consulted leading written work on ADR, especially as applied to the regulation of energy and utilities. Here, the writings of Dr. Raab, Dr. Lawrence Susskind of MIT, and various staff of the Consensus Building Institute and Lincoln Institute of Land Policy were especially helpful. We also referred to scholarly articles published in various law reviews and other journals.⁷³ All works that we consulted throughout the project, are listed in the works consulted section, below.

⁶⁷ "Alternative Dispute Resolution," Alberta Energy Regulator, <http://www.aer.ca/applications-and-notices/alternate-dispute-resolution> [accessed Dec. 1, 2017].

⁶⁸ "ADR Neutrals Names and Bios," California Public Utilities Commission, <http://www.cpuc.ca.gov/General.aspx?id=8218> [accessed Dec. 1, 2017].

⁶⁹ "Jody Freeman," Harvard Law School, <http://hls.harvard.edu/faculty/directory/10285/Freeman> [accessed Dec. 1, 2017].

⁷⁰ "Ari Peskoe," Harvard Law School, <http://hls.harvard.edu/faculty/directory/11615/Peskoe> [accessed Dec. 1, 2017].

⁷¹ "Qualifications," Raab Associates Ltd., <http://www.raabassociates.org/main/qualif.asp> [accessed Dec. 1, 2017].

⁷² "Stacie Nicole Smith," Consensus Building Institute, <http://www.cbuilding.org/about/bio/stacie-nicole-smith> [accessed Dec. 1, 2017].

⁷³ Robert Adler & Elliot Silverstien, "When David Meets Goliath: Dealing with Power Differentials in Negotiations," 5 *Harv. Negotiation L. Rev.* 1 (Spring 2000).

Interview Findings

We distilled the results of our oral and written interviews into seven findings, aimed at addressing the core interests of stakeholders (inclusion; decreasing costs, time, and complexity; ensuring genuine engagement in ADR processes; and transparency), as well as core tensions between interests (rigor v. accessibility, consistency v. flexibility, and a desire for increased guidance from the PUC v. public distrust of the PUC).⁷⁴ It is important to emphasize that these core interests, and tensions between interests, are based on interviewees' statements, and the facts underlying their opinions have not been verified.

Core Interests

Finding 1: On Inclusion

Interest 1:
Stakeholders feel inclusion is essential to improving public access to the PUC's processes.

Inclusion is particularly important to intervenors. Many stakeholders say that intervenors do not feel heard in PUC processes. Representatives of some regional planning commissions are frustrated that they have been excluded from cases to which they are statutory parties. Citizen intervenors are likewise frustrated when they are granted limited standing or excluded from settlement discussions. And many stakeholders, largely intervenors and their attorneys, find it problematic that comments made at public hearings

⁷⁴ See Appendix 4 for a table summarizing all interview findings. For additional stakeholder recommendations that may improve public access to the PUC but are unrelated to ADR, see Appendix 5. For stakeholder opinions and our research on Act 250, see Appendix 6.

and site visits are statutorily not included in the evidentiary record. These stakeholders feel that, until recently, there has been little to no response to public comments from the Commissioners.⁷⁵

To fully include members of the public and make sure broader inclusion does not make the process unduly complex, inefficient, and costly,⁷⁶ those interested in inclusion have specific interests in improving the tone of the process, equalizing the playing field, and educating the public on the project and the process.

Sub-Interest 1(A):

All stakeholders are interested in improving the tone of the process, while increasing the quantity and improving the quality of communications between parties.

All stakeholders have said that PUC processes are conducted like highly adversarial contested cases from beginning to end, even when there is common ground between the parties. Intervenors, representatives of NGOs, and attorneys have said the process can be hostile: according to these stakeholders, the PUC can be patronizing to and impatient with intervenors, and petitioners can be “abusive” to intervenors. The PUC says that intervenors are uncomfortable speaking with petitioners, and petitioners say they feel like they are characterized as “the big bad utility” because the intervenors are struggling with the process, and they do not want to feel this way. A representative of an NGO said that intervenors struggle to find experienced attorneys to represent them. So many attorneys refuse to litigate before the PUC, because they feel disrespected by the PUC and the petitioners. Finally, all stakeholders say they wish for more opportunities to just sit down and talk through the issues, and though they have concerns regarding ADR,⁷⁷ almost all stakeholders believe

⁷⁵ The Commission is now required by 30 V.S.A. § 248(a)(4)(A) to respond to comments made at a public hearing by ensuring that there are findings addressing those comments in its decision on the matter.

⁷⁶ See Finding 2.

⁷⁷ See findings 1(B), 2, 3, 4, 5, 6, and 7.

ADR will provide an effective avenue to improve communication and collaboration between the parties.⁷⁸

Sub-Interest 1(B):

Public sector stakeholders believe that all parties must be on a more equal footing for ADR to be effective.

Right now, there are significant power imbalances between the parties in the PUC processes. The petitioners, particularly large utilities, are advantaged because of greater resources and greater familiarity with the process. Several intervenors said they feel like “little David facing down Goliath.”

As it stands, many stakeholders are concerned about the effectiveness of ADR given the current power imbalance. For example, two citizen intervenors said that negotiating with petitioners who can, and do, threaten intervenors with eminent domain is like negotiating with a loaded gun on the table.

However these stakeholders did believe there were ways to remedy the power imbalance. Attorneys said a skilled mediator may be able to equalize the playing field, and some suggested mediation be conducted via shuttle diplomacy. Others suggested that all parties around the table have attorneys, or else no parties have attorneys. Many stakeholders said that if mediation occurs after discovery, all information will be on the table which will help put all parties on a more equal footing.

⁷⁸ Only one attorney said ADR would not be effective at all in PUC cases. This attorney believes there is no common ground on which to solve problems and build consensus and the power imbalance between parties is too great for ADR to be effective.

Sub-Interest 1(C):

All stakeholders want the public to have more information on the proposed project and the PUC review process.

Citizen intervenors say that intervenors generally do not have time to become experts on the subject matter of the project, let alone the contested case process, and without substantive knowledge of the case or familiarity with the case process, there is no way to catch up. Stakeholders said that familiarity with the process is key to success before the PUC. The so-called “frequent flyers” at the PUC, those who have taken part in multiple cases and have familiarity with the process, generally do better than those new to the process.

Furthermore, petitioners expressed concerns that citizens cannot ask questions at public hearings, only make statements. According to these petitioners, while the meetings the PUC is now holding before public hearings to educate the public on the project are an improvement, they are not enough for citizens to gain sufficient information on the project to determine if they have concerns. Compounding this problem, petitioners say the deadline to intervene is sometimes the same day as the public hearing or even before the public hearing, so citizens do not have enough information to decide if they want to become a party to the case or if they just want to make public comments.

For the public to be effectively included in the case, stakeholders feel the public needs more information. Some petitioners expressed willingness to host educational programs on their projects, and many stakeholders supported increased community outreach by petitioners prior to filing with the PUC.

To summarize, inclusion is important for all stakeholders. For parties to be effectively included, stakeholders want the tone of the process and communication between parties to be improved, the power imbalance between parties to be rectified, and the public to be educated on the project and the process. For ADR to be successful, all stakeholders

agree that the process needs to allow parties to be heard, and all parties with a legitimate interest in the project must be granted a seat at the table.⁷⁹ To that end, stakeholders say ADR should not take place until intervenor status has been granted and all parties to the case have been identified, but the deadline to file to become an intervenor must not be until after the public hearing,⁸⁰ so that potential intervenors have enough information on the project to decide if they want to become a party to the case. And for parties to feel they have power in ADR and thus for ADR to be effective, steps must be taken to equalize the playing field.

⁷⁹ See the “Timing of ADR” section below for a full discussion of sequencing the ADR process within the current PUC process.

⁸⁰ See below, in “Recommendation 2” and “Informing the Recommendations.”

Finding 2: Decreasing Costs, Time & Complexity

Interest 2:

All stakeholders want to decrease the costs, time, and complexity associated with current PUC processes, and ensure that any ADR process implemented also decreases costs, time, and complexity.

Though each group of stakeholders held these interests for various reasons, all stakeholders indicated a desire for reduced costs and time associated with the PUC process as well as a desire for a simpler process.

While many petitioners feel the timeline for PUC cases is appropriately efficient, “indeed more efficient than most courts,” some petitioners said the process could take too long, particularly when many intervenors become involved. Intervenors share this interest in efficiency, saying the process takes too long and is too time consuming. Citizen intervenors described losing employment and friends to the process. And the PUC says it is not operating as efficiently as it should be, because it has been overwhelmed by the influx of renewable energy projects.

Expense is also a large concern. The longer the process takes, the more costly it tends to be. Well-funded petitioners are concerned because they have to push extra expenses back on the ratepayers, while smaller developers have no ratepayers to cover costs and must cover the entire cost of the project themselves, so increased expenses can be a significant barrier to the project’s completion, sometimes stopping the project altogether. Small developers, as well as citizen intervenors and regional and municipal planning commissions, also struggle with the costs of hiring the expensive attorneys and expert witnesses they believe necessary to navigate PUC processes. Representatives of regional planning commissions told us that most regional planning commissions and towns will not intervene in PUC cases at all because of their inability to pay for attorneys and experts or additional staff to appear before the PUC, as well as confusion regarding PUC processes. According to

many intervenors and attorneys, intervenors are simply not financially equipped to be a match for the petitioners.

Finally, the PUC, attorneys, representatives of regional planning commissions and towns, and citizen intervenors all expressed an interest in simplifying the process. For example, these stakeholders say that intervenors complicate an already complex process, both in terms of logistics and substance. Furthermore, all intervenors said the process can be daunting, overwhelming, and bewildering, especially since they also said there is a lack of user-friendly guidance on the process.

While stakeholders are hopeful that ADR will ultimately reduce the time, expenses, and complexity of the PUC processes, petitioners and members of the PUC have significant concerns that it could in fact increase time and expenses and could deter renewable development. These stakeholders have said there must be limits imposed on ADR to ensure its usefulness. For example, while all stakeholders say that all interested parties need a seat at the ADR table,⁸¹ the more intervenors present, the more complex, time consuming, and expensive the ADR process will become. Furthermore, determining which parties have a legitimate interest, such that they should be at the table, will be challenging. One attorney suggested that if the number of parties becomes too unwieldy for effective conversation, specific parties could engage in ADR for specific issues, such as aesthetics or noise, to keep the process simple.

⁸¹ See Findings 1 and 4.

Finding 3: On Genuine Engagement by Parties

Interest 3:

Petitioners and the PUC are concerned with using ADR to engage in problem-solving, but are skeptical that all parties share this interest.

Given their interests in minimizing the expenses and length of the process, as well as their desire to simplify the process on the whole,⁸² petitioners are particularly concerned about the possibility that intervening parties could engage in ADR with no real desire to solve problems and allow the project to go forward. These stakeholders say that many parties, particularly neighboring landowners, intervene to stop the project at all costs, and could use ADR to delay the project until it becomes financially unviable for the petitioner to go forward with the project. One small developer told us how they worked with a neighboring landowner to resolve their aesthetic concerns about a project, but every time the developer agreed to a solution, the neighbor raised a new problem, until it became impossible for the developer to proceed with the project at all.

Along these lines, petitioners have expressed a desire for agreements reached through ADR to be final, to ensure intervenors cannot abuse ADR for the purpose of delaying or stopping the project. Petitioners say that opposition to a project often appears late in the process as it is, complicating matters even further. After engaging in ADR and resolving intervenors' concerns, they do not want these same intervenors to raise additional concerns later in the process.

The largest concern we heard about implementing ADR into PUC processes, from petitioners and intervenors alike, was that ADR would not be capable of resolving disputes involving one party who simply wanted to prevent the approval of the project. These stakeholders therefore have a strong interest in ensuring that all parties who engage in ADR

⁸² See Finding 2.

throughout the PUC process are truly committed to resolving their concerns. For example, several of these stakeholders recommended that any additional costs of ADR be borne by all parties involved. Cost-sharing need not be equal, however these stakeholders felt that requiring all parties to contribute to ADR would minimize the risk of parties abusing the process for their own ends.⁸³

Finding 4: On Transparency

Interest 4:
Attorneys, intervenors, and representatives of the PUC and PSD all have a strong interest in the transparency of the PUC's dispute resolution processes.

The interest in transparency, shared by many stakeholders, is important for several reasons. Intervenors' concerns about transparency come directly from the feelings of exclusion many of them have experienced during the PUC processes. The PUC and PSD are concerned with transparency both because of the requirement that the PUC create an evidentiary record reviewable by the Vermont Supreme Court and because of a desire to combat negative public perceptions of the PUC. Implementing an ADR process that is as transparent as possible could alleviate most of these concerns.

Stakeholders demonstrate their interest in transparency both in their reflections on the current process and their recommendations for possible ADR processes. Many intervenors, reflecting on the current process, are upset by the lack of transparency around certain aspects of the PUC's current process. Several stakeholders describe the PUC as a black box. They say that, "information goes in and a decision comes out, but no one really knows how that decision is made. The criteria they use is a mystery." One citizen intervenor expressed a belief that the public's distrust of the PUC may come from the lack of clarity

⁸³ See the "funding ADR" section below for a complete discussion of this point.

around how decisions are reached. Along similar lines, several parties believe the PUC is encouraging too many settlement agreements because of the lack of transparency around these agreements. At best, stakeholders are upset that the settlement process is off-the-record. At worst, stakeholders view these settlements as behind-closed-doors deal-cutting that excludes intervenors, whether citizen, town, or regional planning commission. Finally, taking a different approach but expressing the same interest, an attorney supports the use of pre-filed testimony because “it is completely transparent and eliminates surprises in the process.”

Parties, therefore, want to see and understand the process at work, and this interest is reflected in their suggestions for and concerns about implementing ADR into the PUC’s processes. All these stakeholders say the process must be transparent, but they also recognize that a core tenet of processes such as mediation is that they take place off the record. Stakeholders are not opposed to settlement agreements or, more broadly, ADR. They are instead opposed to the lack of transparency and air of exclusion that has surrounded these agreements to this point. And therefore, we must consider both stakeholders’ desire for transparency and the inherently private nature of many ADR mechanisms.

Tensions: Competing Interests

Finding 5: The Rigor–Accessibility Tension

Tension 1:

There is a tension between the importance of technical rigor in decision-making and the PUC's and the public's desire for the creation of a more accessible process.

Petitioners and members of the PUC and PSD agree that the rigor currently applied to the evidence is necessary because the issues involved in the PUC's cases are highly technical. The PUC's processes are built for the analysis of technical and scientific evidence, and rigorous analysis ensures a high-quality, scientifically-sound decision parties can trust.

However this creates several problems for the general public. Citizen intervenors and others without expertise often struggle to follow expert testimony and cross-examination during PUC hearings. Intervenors also struggle with aspects of the process such as pre-filed testimony and discovery. As many intervenors said, "The language of the PUC is not the language of the average person." Beyond the process itself, there is a disconnect between the technical rigor the PUC applies and the often emotional concerns (such as those relating to aesthetics) that intervenors believe should be given the same weight as technical evidence.

The PUC's goal is to make the process more accessible to the general public, however one member of the PSD said that it will be difficult to have confidence in decisions reached through ADR, if such processes lack rigorous analysis of scientific data. Multiple stakeholders say that any mediator or facilitator must have expertise in the subject of the case, and the PUC will still have to approve any decision reached through ADR.

Therefore, because technical rigor is so important to parties' confidence in the PUC's process and the overall quality of siting outcomes, any steps taken to make the process more accessible should seek to maintain as much rigor as possible.

Finding 6: The Consistency–Flexibility Tension

Tension 2:

There is a tension between stakeholders' interests in consistency and finality and their interest in flexibility.

In discussing the current process, stakeholders have generally indicated that consistency is an important aspect of the process, though they disagree as to how it applies to the PUC in practice. Petitioners are happy with how consistent the process is, while intervenors feel the process has no consistency whatsoever, possibly due to the inaccessibility of the process. However stakeholders across all groups have also expressed that any ADR system we recommend should be flexible to account for different cases.

While petitioners are generally happy with the consistency of the process because they know what to expect, intervenors say otherwise. According to many intervenors and attorneys, procedure at the PUC is inconsistent from case to case; questions of standing, intervenor status, accepted testimony, and other procedural questions are dependent on the hearing officer; and it seems as if the PUC “is operating in a complete absence of rules, making it up as they go along.” Whether they expressed satisfaction or dissatisfaction with the current level of consistency in the process, all parties have an interest in a level of consistency which allows them to know what to expect from a process. For example, some stakeholders said that ADR should be a mandatory part of the PUC process.

But even with this high interest in consistency, most stakeholders also wish for flexibility within the process. Some petitioners and attorneys have said that flexibility is lacking in the current process, for example, and there is not enough room in the process to modify the project to mitigate intervenor concerns. And most stakeholders said that ADR needs to be flexible to be effective. Attorneys say since all cases are different, ADR needs to be flexible to accommodate the type of case and the needs of the parties. For example, most stakeholders say that ADR should not be mandatory because ADR may not be useful for all cases. Similarly, a member of the PUC said that the timing of ADR could perhaps depend

on the relationship between the parties—parties with a better relationship may be able to engage in ADR before discovery, for example, while parties with less trust between them may need to conduct discovery before they feel comfortable engaging in ADR. On the whole, several stakeholders from various groups said ADR should be flexible and occur organically throughout the process.

This tension between consistency and flexibility indicates that any ADR system implemented into PUC processes should be both reasonably consistent and reasonably flexible for stakeholders to feel comfortable with the process, and flexibility should be applied consistently to the process. For example, as a member of the PUC and a representative of an NGO recommended, there could be a screening mechanism at the same time during every case which would determine whether ADR is appropriate.

Finding 7: The Guidance–Neutrality Tension

Tension 3:

There is a tension between stakeholders’ desire for more guidance from the PUC and their interest in neutrality, underscored by the public’s general mistrust of the PUC’s processes.

Stakeholders from all groups have indicated both that they would like more guidance from the PUC throughout the process and that they are strongly interested in neutrality. These two interests would not necessarily be in conflict, but for the public’s distrust of the PUC, and the concerns of petitioners, the PSD, and the PUC itself, that involving the PUC in ADR processes could create conflicts of interest.

Petitioners and attorneys have said there is currently little to no contact with the PUC between the pre-hearing conference and the technical hearing, and while this isn’t necessarily a problem, the process might benefit from more frequent status conferences in which the PUC could provide guidance on areas to target further inquiry or possible avenues for settlement. Other petitioners and attorneys expressed a belief that the PUC does not currently provide enough opportunities or enough guidance for settlement agreements. In discussing possibilities for integrating ADR into the PUC processes, intervenors have expressed not only willingness, but also a desire, to have a member of the PUC staff facilitate or mediate discussions with the parties

Stakeholders are also deeply concerned with the neutrality of any facilitator mediator employed as part of ADR. Right now, the public mistrusts the PUC and questions its neutrality. Intervenors and attorneys have said the PUC is very friendly—perhaps too friendly—with petitioners. Furthermore, intervenors feel in the current climate, there is no way to successfully object to a project: they feel the deck is stacked against them and the project has already been approved by the PUC before the process even begins. One citizen intervenor went so far as to say that landowners abutting a project would do better to “sell your land and run like hell.”

Given all these concerns, several stakeholders were concerned about the possibility of a facilitator or mediator from the PUC or PSD. Intervenors are uncertain that such a mediator or facilitator would be neutral, petitioners are concerned about conflicts of interest, and attorneys expressed both opinions. These stakeholders all agreed that if a mediator or facilitator were to come from the PUC or PSD, this person would have to be completely independent from the case at hand.

Despite their general distrust of the PUC, stakeholders recognize and appreciate the PUC's responsiveness to critique and efforts to solve problems. Furthermore, stakeholders' desire for increased contact with and guidance from the PUC staff during the case indicates that these stakeholders want to trust the PUC, and therefore that the PUC is capable of improving its public image so that parties could potentially trust a PUC facilitator or mediator.

Recommendations: Summarized & Contextualized

An Overarching System: Beyond a Single Mediation Mechanism

The ADR system outlined below focuses not solely on formal mediation, but rather on an overarching dispute prevention and resolution process. This system goes beyond reflexively dealing with conflicts once they arise. It seeks to prevent disputes from arising in the first place by implementing processes to operate in advance of a dispute, by reducing expenses and time spent in dispute, and by identifying disputes that would benefit from ADR and those that would not.⁸⁴

Ideally, as parties move through each ADR mechanism within the process, issues will be resolved and the scope of the case will be narrowed, so that by the time the case reaches the technical hearing—if a technical hearing is even necessary—most if not all contested aspects of the case will have been settled. The goals of these recommendations are to simplify and clarify the process for intervenors, as well as to change the tone of the PUC proceedings from that of a contested, adversarial case to that of a collaborative effort aimed at solving problems and creating the best possible outcome for as many parties as possible.

Substantive Recommendations

Based on our findings, we have formulated several recommendations for alternative dispute resolution mechanisms that can be implemented into the PUC's contested case processes. These recommendations are primarily aimed at siting cases, however they may be scalable to ratemaking cases as well. Below, we also discuss when in the process these

⁸⁴ See Nancy Rogers, Robert Bordone, Frank Sander, Craig McEwen, *Designing Systems and Processes for Managing Disputes* (2013), at 116–31, which states that an effective dispute system will seek to achieve most of these goals.

systems could be implemented, the identity of the person or persons facilitating these systems, and funding of these systems.

Table 2: Recommendations Summarized

1. The PUC ensure, or strongly encourage, community outreach by the petitioner before a filing of a petition.	2. The PUC host a screening meeting , attended by all parties. This meeting would allow for a dispute to be flagged for future mediation, and could also present an opportunity for conciliation and/or facilitation .
3. The PUC support collaborative discovery efforts , ranging from mutual agreement on scope and method of information gathering, to joint fact-finding.	4. The PUC engage the parties in formal mediation , to resolve or narrow the issues.
Considerations Informing these Recommendations: <ul style="list-style-type: none"> • Timing of ADR • Identity of Facilitator, Mediator, and participants • Funding ADR • What happens after ADR 	

Procedural Recommendations

The aforementioned substantive recommendations may also require a re-ordered Section 248 review process. This re-ordered process is laid out in *Figure 3: Procedural Recommendations*, below. These procedural changes will be addressed in the description of “*When*” and “*How*” for each substantive recommendation.

Figure 3: Procedural Recommendations



Recommendation 1:

Pre- and Early-Petition Community Outreach

We recommend that the PUC ensure, or at least strongly support, effective community outreach by petitioners prior to the filing of their petition and throughout the early stages of the siting case process.

The PUC should ensure, or at least strongly support, effective community outreach by petitioners prior to the filing their petition, and throughout the early stages of the siting case process. This community outreach process would consist of:

- provision of notice to neighbors much earlier than the filing of a petition;
- hosting a broad, nontechnical public hearing earlier in the petition process;
- inviting affected parties to engage in a pre-petition scoping conversation, similar to those provided for under Vermont’s *Act 250*; and
- considering the requirement or encouragement of a Public Involvement Program, following the model provided by the New York Siting Board.⁸⁵

Why Early Community Outreach?

Pre-petition community outreach would allow for earlier notice and more dialogue. Dialogue prior to the initiation of contested case proceedings leaves more room for compromise and problem-solving, while encouraging parties to re-consider their positions before becoming entrenched in those positions. Petitions could potentially be amended to address the concerns of neighbors before they are filed with the PUC, so that neighbors

⁸⁵ “DPS Staff Guidance on Preparing a Public Involvement Plan,” New York State DPS, [http://www3.dps.ny.gov/W/PSCWeb.nsf/96f0fec0b45a3c6485257688006a701a/6fd11ce8db088a2785257e200054a99b/\\$FILE/PIP%20Guidance%20Document%202.8.13.pdf](http://www3.dps.ny.gov/W/PSCWeb.nsf/96f0fec0b45a3c6485257688006a701a/6fd11ce8db088a2785257e200054a99b/$FILE/PIP%20Guidance%20Document%202.8.13.pdf) [accessed Dec. 1, 2017].

would feel no need to intervene in the contested case process. Neighbors could also have a more in-depth understanding of the project before deciding whether or not to intervene. Indeed, robust pre- and early-petition community outreach could play an important role in ensuring that unnecessary disputes are avoided altogether.

As captured by Finding 1, numerous past intervenors, their attorneys, and other stakeholders have noted that affected communities and neighbors would benefit from earlier

Pre-petition outreach allows for earlier notice and more dialogue—disputes could be resolved before an application is even submitted.

notification about proposed projects. Potential intervenors would benefit from more opportunities to talk with developers before entering into the formal contested case process—resolution of any dispute before that point would

save everyone time and money.

Timing of Early Community Outreach

Pre-petition community outreach would represent a departure from the current process in a few ways.

Earlier Notice

Currently, petitioners in Section 248 proceedings are required to give “advance notice of the proposed project to the municipal and regional planning commissions and the municipal legislative bodies in the town where the project will be located,” 45 days before filing a petition.⁸⁶ Provision of “notice to adjoining landowners” in Section 248 proceedings is required only at the time that its petition is filed.⁸⁷ Positively, the 2017 revised net-metering rules added adjoining landowners and others to the list of those required to receive

⁸⁶ “Section 248 Procedures,” Vermont PUC, *supra* n.18.

⁸⁷ *Id.*

45-day notice of petitions for net-metering systems over 15kW.⁸⁸ This same broadening of the 45-day notice requirement should apply to all larger Section 248 petitions, so that these potential intervenors are notified before a petition is filed.

Petitioners should engage in, and aim to complete, outreach to effected communities and individuals before they file their application at the PUC.

An Earlier Public Hearing

Per Section 248(a)(4)(A), the PUC is required to hold a “nontechnical public hearing on each petition” for a certificate of public good.⁸⁹ Currently, the PUC holds the public hearing (usually also attended by the petitioner), after the petition has been submitted, and after the prehearing conference.⁹⁰ Making the required public hearing a part of pre-application community outreach could assist potential intervenors in understanding the scope and effect of the proposed project. The Commission is currently required to hold a “public hearing to provide members of the public an opportunity to comment on the case” after an application has been filed, and a prehearing conference has been held.⁹¹ It could be beneficial if this hearing were held before the prehearing conference, so that all those community members and neighbors interested in intervening could get more information before the formal contested case process was initiated. While this may require a change in the order of the current contested case process, it should not require any statutory change, given that Section 248 does not make any mention of when the public hearing is to be held, so long as it is held before a certificate of public good is issued.

⁸⁸ Vermont PUC, Rules 5.106(C)(1), 5.107(B)(1), (July 1, 2017), http://puc.vermont.gov/sites/psbnew/files/doc_library/5100-PUC-nm-effective-07-01-2017_0.pdf [accessed Dec. 1, 2017].

⁸⁹ 30 V.S.A. § 248, *supra* n.26.

⁹⁰ “Section 248 Procedures,” Vermont PUC, *supra* n.18.

⁹¹ *Id.*

The Public Involvement Plan & Scoping Meeting

A Public Involvement Plan, described below, should be submitted to the PUC when the petitioner gives notice to the relevant neighbor(s), municipality(ies), and region(s). The scoping meeting could happen at around the same time as the public hearing, or a few weeks thereafter. Holding the scoping meeting a few weeks after the public hearing would allow for the resolution of any disputes that may have arisen during the public hearing.

Implementation: Learning from Best Practices

Some community outreach does happen presently: affected communities and individuals are, in at least some situations, guaranteed notice, and are ensured community meetings.⁹² Some larger utilities, with more resources and experience, have said that they engage in widespread community outreach. This pre-petition community outreach—which can minimize conflicts or help them to be avoided altogether—should be expanded.

The Public Involvement Plan

The Vermont PUC could require, or strongly encourage, applicants to submit a brief Public Involvement Plan (PIP), simultaneous with pre-petition to municipalities and neighbors. This PIP should show that the applicant has planned to engage in community outreach early in the process and continuing throughout.

Petitioners submit a Public Involvement Plan at least 45 days before their application, and report action consistent with the PIP.

The purpose of a PIP is “to facilitate communication between the applicant and interested or affected persons.”⁹³ With that in mind, the PIP should include:

⁹² *Id.*

⁹³ Article 10 (2011), §163(3), New York, [http://www3.dps.ny.gov/W/PSCWeb.nsf/0/d12e078bf7a746ff85257a70004ef402/\\$FILE/Article10LawText%20.pdf](http://www3.dps.ny.gov/W/PSCWeb.nsf/0/d12e078bf7a746ff85257a70004ef402/$FILE/Article10LawText%20.pdf) [accessed Dec. 1, 2017].

- Identification of stakeholders, especially those affected by the project, such as host and adjacent landowners.
- Strategies to notify affected stakeholders of the future application and its contents.
- Plans for consultation with the affected agencies and other stakeholders in person, over the phone, and/or through mailings.
- Activities designed to encourage stakeholder participation at the earliest possible opportunity and throughout the certification and compliance process (the earlier Public Hearing could be a good example of such an activity).
- And, to ensure compliance with the original PIP, petitioners should also be required to file a report of any outreach as part of the PIP with the PUC.⁹⁴

The PIP, as outlined here, is based upon of the example provided by the Service Board of the New York Department of Public Service. New York requires applicants to develop and implement a PIP.⁹⁵ Examples of a PIP provided to the New York DPS can be found below, in Appendix 5.⁹⁶

The “Scoping” Meeting

The PUC should encourage, or require, the petitioner to meet with parties affected by a proposed development in a “scoping meeting.” In 2017 the Commission began splitting public hearings into two parts. The first part is an information session in a Q&A format hosted by the PSD, at which a petitioner provides a briefing of the proposed project to the public and responds to questions. The second part of the public hearing provides the public with an opportunity to comment on the proposed project to the PUC. It could be beneficial to schedule these two events separately with the information session serving as the ‘scoping meeting’.”

⁹⁴ “DPS Staff Guidance on Preparing a Public Involvement Plan,” New York Board on Electric Generation Siting and the Environment, *supra* n.86.

⁹⁵ *Id.*

⁹⁶ “Submitted Public Involvement Plans,” New York Board on Electric Generation Siting and the Environment, <http://www3.dps.ny.gov/W/PSCWeb.nsf/All/9421F752D4A4D6C585257A5900631D6F?OpenDocument> [accessed Dec. 1, 2017].

At this scoping meeting, the petitioner would “provide public information and increase notice about the project, allow discussion of the proposed project, and identify potential issues at the beginning of the project review process” by delivering “a description of the proposed project and be available for questions... concerning the proposed project.”⁹⁷

Petitioners engage neighbors, the municipality, and statutory state parties in a focused, pre-application scoping meeting.

Unlike a more formal, broader public meeting, the scoping meeting should engage only neighbors, as well as the relevant municipal selectboard and planning authority, and the relevant state agencies. The petitioner should be required to include, as part of its petition, a brief description of the results of the scoping meeting

Ultimately, this scoping meeting could pursue the same goals as the prehearing conferences required in Vermont land use cases, Act 250, which aim at promoting “expeditious, informal and non-adversarial resolution of issues.”⁹⁸ Yet, the meeting could be structured as a more informal conversation between the applicant and the affected parties, enumerated above. It could take place in person or over the phone. The important point is that each of the parties listed above groups be invited or engaged directly, prior to the filing of a petition.

Addressing Potential Concerns

The recommendations laid out above could be seen by petitioners, and others especially concerned with promoting development, as overly onerous, expensive, possibly

⁹⁷ 3 V.S.A. § 2828, <http://legislature.vermont.gov/statutes/section/03/051/02828> [accessed Dec. 1, 2017].

⁹⁸ Act 250 expressly encourages the resolution of conflicts in a non-adversarial manner. Furthermore, Rule 16(D) of the Natural Resources Board’s District Environmental Commission Act 250 Rules implements this provision, stating “[i]n the normal course of their duties, the district commissions shall promote expeditious, informal and non-adversarial resolution of issues, require the timely exchange of information concerning an application and encourage participants to settle differences in any Act 250 proceeding.” See 10 V.S.A. § 6085(e), <http://legislature.vermont.gov/statutes/section/10/151/06085> [accessed Dec. 1, 2017]; Vermont NRB, “Act 250 Rules,” Rule 16(D), <http://nrb.vermont.gov/sites/nrb/files/documents/2015rules.pdf> [accessed Dec. 1, 2017].

redundant, and unnecessary. We were told that large utilities may have resources to engage in some pre-petition outreach, but smaller merchant generators may not. However, the recommendations made above need not make the pre-petition process overly expensive or onerous. If conflict is avoided altogether—and those who may have intervened no longer feel the need to do so—everyone, including petitioners, could save time and resources, overall.

To address each of the four proposals made above: Notifying affected landowner neighbors at the same time as municipalities (i.e. 45 days prior to filing) in all cases may

If conflict is avoided altogether—and those who may have intervened no longer feel the need to—everyone, including petitioners, could save time and resources, overall.

require slightly more foresight on behalf of the developer, but should not require greater expenditure of resources. The same can be said of moving the information session earlier in the process. Engaging in pre-petition scoping conversation or meeting may add some expense.

But this conversation need not be formal, nor even in-person. It could be done over the phone, for instance. And, if the conversation goes well, it could save the petitioner from having to deal with intervenors later in the process. Finally, PIPs—although presenting another hoop for a developer to jump through—would ensure that developers have thought about engaging neighbors and municipalities. A PIP could be informal, and need not require extensive drafting expense.

Interests Satisfied, and Tensions Implicated, by Recommendation 1

Interest / Tension	✗ / ✓	Description
Interest 1	✓	Stakeholders would feel included in the siting process from the very start, and neighbors would not have to wait until an application is submitted to receive notice, be a part of the conversation.
Interest 2	✓	If neighbors, and other stakeholders, are apprised of the application earlier on, and dispute-resolution conversations begin earlier in the process, less time and resources will be spent on intervention processes before the PUC.
Interest 3	✓	When affected parties have earlier and more comprehensive notice about an impending petition, they will be able to be better prepared to genuinely engage with the Section 248 process.
Interest 4	✓	Requiring a PIP, and having a petitioner submit updates on PIP-inspired action, allows for greater transparency and consistency in the community outreach process.
Tension 1	✗	
Tension 2	✓	Requiring a PIP, and early community outreach, may stifle necessary flexibility, and could cause petitioners to engage in unnecessary outreach.
Tension 3	✗	

Recommendation 2:

Dispute Screening in Re-Focused Pre-Hearing Meetings

The PUC should refocus its existing pre-hearing conference, using the conference as a “screening” meeting, to engage in and encourage the use of alternative and informal dispute resolution, and gauge the feasibility of formal mediation for the matter.

Why Implement a Screening Meeting?

Flagging Promising Cases

Stakeholders are almost universally supportive of implementing mediation, or some other form of ADR, in the PUC’s contested case process because they feel that it could save time and resources, and help parties reach more effective and efficient outcomes. Yet, numerous stakeholders expressed concern that a presumptive requirement of mediation, or entry into mediation without any good faith pre-mediation discussion, could result in abuse of the mediation process. A facilitated screening meeting would help ensure that matters suitable for mediation are removed from the quasi-judicial case process and those cases that are unlikely to benefit from mediation proceed to the next stage in the contested case process.

A screening meeting would allow for an early attempt at less-formal ADR, and would also ensure that cases flagged for mediation are appropriate for mediated resolution.

Screening has also been supported in the ADR literature. According to a recent report by the Lincoln Institute of Land Policy, “A successful mediation program requires

selecting suitable cases for mediation at the right time in the process.”⁹⁹ Here, the screening meeting could flag which cases are suitable for mediation.

Early Facilitative ADR

Additionally, the screening itself could encourage informal negotiations and settlement in some instances.¹⁰⁰ Before the parties or the PUC or parties forward the case to more formal mediation, the screening meeting could allow parties to engage in conciliation or facilitation.¹⁰¹ Conciliation may take place following the procedural discussions in the screening meeting. The parties—who may only have needed to be called into the same room, and have an opportunity to talk, to resolve their dispute—may turn to the substantive nature of their dispute once the PUC staff leave the room.¹⁰² Alternatively, the staff running the screening meeting could aim to facilitate a conversation between the parties to the dispute, moving the parties towards deeper understanding, and even resolution.¹⁰³ As an important mechanism to flag cases for future formal mediation, and/or to encourage conciliatory and facilitative dialogue, a screening meeting is a necessary component of the overall ADR system.

⁹⁹ Patrick Field, Kate Harvey & Matt Strassberg, *Integrating Mediation in Land Use Decision Making: A Study of Vermont*, Lincoln Institute of Land Policy: Land Lines, (Jan. 2010), at 14, https://www.lincolninst.edu/sites/default/files/pubfiles/1733_953_LLA100104.pdf [accessed Dec. 1, 2017].

¹⁰⁰ As in Recommendation 1, this dialogue could be based off of the ‘scoping’ meeting in Act 250. *See id.* at 16.

¹⁰¹ *See* Ari Peskoe, *Alternative Dispute Resolution at Public Utility Commissions*, *supra* n.6.

¹⁰² *Id.*

¹⁰³ *Id.*

Conciliation: building bridges of communication between the parties, helping parties correct and clarify misconceptions about one another and their positions, and develop trust so that open and collaborative discussion can take place.

Facilitation: improving lines of communication between parties. While conciliation primarily seeks to encourage trust and dialogue, facilitation aims to resolve a particular dispute ... or otherwise engage the parties in discussion about the substance of a proceeding.

*From Ari Peskoe, *Alternative Dispute Resolution at Public Utility Commissions*, supra n.6.*

When does the Screening Meeting Take Place?

The initial screening meeting would take place once the pre-petition community outreach and community meetings or public hearings has taken place, the petition has been filed, and the intervention deadline has passed.

The initial screening meeting can be conceived of as a fork in the road. Should the case be deemed ripe for mediation, and any conciliation or facilitation fails to resolve the dispute, the matter could move straight into mediation following the screening. Or, should the matter be deemed not suitable for mediation, it could proceed straight into joint fact-finding or traditional discovery, and eventually into hearings, following the screening meeting.

Functionally, this could replace the PUCs “Prehearing Conference,” but not as currently represented on the *Section 248* timeline.¹⁰⁴ Indeed, it would be best to push the screening meeting further down the existing *Section 248* timeline, as stakeholders have stressed that all parties need to be at the table during any kind of ADR discussion. Also unlike the current Prehearing Conference—which is centered on setting schedules and addressing other minor procedural issues—the screening meeting would be used as an

¹⁰⁴ “Section 248 Procedures,” Vermont PUC, *supra* n.18.

opportunity to engage in substantive conversation on the nature, and resolvability, of the dispute.

Although the initial screening meeting would occur before any meaningful discovery, subsequent screening meetings (or status conferences) could be called—by the PUC or by the parties—throughout the process. Following joint fact-finding and/or discovery, should the parties’ understanding of the facts lead to the belief that alternative dispute resolution or mediation be viable, another screening meeting could be called by the hearing officer assigned to the matter, and/or given the consent of both parties, in order to reassess the situation.

Who is Involved?

The initial screening meeting, following submission of the petition, should be convened by the PUC and facilitated by a hearing officer or Commissioner (the “facilitator”). The PUC will have to decide if the facilitator should be allowed to continue working on the same matter in a different role, following screening.

Given that the screening meeting will likely involve discussion of the case, it seems wise that the PUC facilitator should not be enabled to work either in the role of the mediator, if mediation is initiated, or as the case officer, if the matter proceeds to litigation. According to the Lincoln Institute, “screeners as mediators may be influenced by the opportunity to mediate, if they are eligible. We would argue that this incentive is ... professional in the sense that one wishes to practice one’s craft.” At the

The PUC will need to:

- Decide if the facilitator should be allowed to continue working on the same matter in a different role, following screening.
- Ensure all parties, including all intervenors, are represented at the screening meeting.

same time though, “countervailing arguments suggest that a strict separation of screening and mediation poses an equally difficult set of problems.”¹⁰⁵ Indeed, the facilitator may have the best sense of how the matter could be resolved in mediation. This decision should be left to the Commissioners.

The initial screening meeting should also involve:

- the petitioner;
- statutory parties, such as the PSD and ANR;
- and all intervenors.

As mentioned above, it is important that all parties—including intervenors—be at the table from the start of the ADR process. Consequently, public hearings and meetings, as well as the establishment of an intervenor list, should precede a screening meeting for this very reason. If intervention status is granted and finalized before the matter is screened, no party will feel excluded from the ADR process.

Finally, because many parties with divergent interests on multiple issues may be involved in the screening meeting, the facilitator could assist the parties in breaking the dispute down into discrete parts. For example, if the parties realize that there is no dispute between the ANR and the petitioner, the facilitator could dismiss ANR and focus on the dispute between intervenors and the petitioner, for instance. This process will ensure that the appropriate parties are involved in any further dispute resolution process.

Facilitating Dialogue: Learning from Best Practices

The screening meeting should be a facilitated dialogue between the parties. A helpful example of a facilitated dialogue is provided by Vermont Rules for Environmental Court Proceedings. In these proceedings, the court ensures that the parties consider:

- the potential for dismissal of all or some issues;

¹⁰⁵ Patrick Field, Kate Harvey & Matt Strassberg, *Integrating Mediation in Land Use Decision Making*, *supra* n.100, at 16.

- whether to narrow some issues;
- the use of alternative dispute resolution or other means of expediting the proceeding;
- if settlement is not possible, the appropriate type, sequence and amount of discovery;
- and any other matter necessary to the expeditious and fair disposition of the proceeding.¹⁰⁶

Like the initial conference before the Environmental Court, the screening meeting before the PUC could serve to narrow issues, determine whether ADR is appropriate and if not, determine the nature of discovery.

Other jurisdictions also provide examples of effective screening or pre-hearing meetings. The California Public Utility Commission, for example, employs Administrative Law Judges (who act like hearing officers), to discuss ADR with parties at the first prehearing conference. If further ADR seems feasible, the California PUC's ADR Coordinator joins the meeting to suggest potential processes and offers neutrals (facilitators, mediators, etc) to the parties.¹⁰⁷

Siting matters brought before the Alberta Energy Regulator (AER), in Alberta, Canada, also go through a screening meeting. It is assumed that the "parties ... first attempt[ed] to cooperatively reach agreement" before the screening meeting is even convened. But, should a first attempt at cooperative resolution fail, the AER facilitates what it calls preliminary alternative dispute resolution (PADR) meeting.

This PADR meeting is, like a PUC screening meeting, meant to discuss the nature and extent of the dispute among the parties and possible options for resolution. The parties, with

¹⁰⁶ See Environmental Division of the Vermont Court of Justice, "Rules for Environmental Court Proceedings," Rule 2(d)(2), https://law.pace.edu/sites/default/files/IJIEA/Rules_for_Environmental_Court_Proceedings.pdf [accessed Dec. 1, 2017]. These rules are employed when parties appeal an unfavorable ruling made in the Act 250 process to the Environmental Division of the Vermont Court of Justice. While the discussion in an appeal process may be very different, the structure of the conversation could be used in the PUC's screening meeting.

¹⁰⁷ California Public Utilities Commission, *Resolution ALJ-185: Expanding Opportunities for and Use of Alternative Dispute Resolution Processes at the Public Utilities Commission*, ALJ/JET/hkr, (Aug. 25, 2005), http://docs.cpuc.ca.gov/word_pdf/FINAL_RESOLUTION/49129.pdf [accessed Dec. 1, 2017].

the assistance of a facilitator, will clarify the issues under dispute and discuss matters of process, specifically:

- the key issues requiring resolution;
- the information that is needed to address the dispute and how it should be obtained, including how to ensure that the parties disclose all relevant information;
- the role of advisors (lawyers, AER staff, and experts);
- who should participate in the discussion and the level of authority required;
- options available to resolve the dispute;
- further process steps to be taken;
- meeting location, date, time, and length;
- matters of timing, deadlines, confidentiality, and privacy; and
- willingness to continue to participate in mediation or another process.¹⁰⁸

The PUC screening discussion could be modeled on the AER's PADR dialogue.

After engaging in a conversation of this nature, the parties and facilitator may have been able to narrow the issues of dispute, or even resolve some or all of the disputed issues. Should there still be areas of dispute, the parties and facilitator should have a sense of whether or not further ADR—in the form of formal mediation—is feasible, or if the dispute should proceed in a formal contested case. Sometimes, all parties and the facilitator will agree that mediation is, or is not, a good idea. The case may then proceed as agreed upon by all. But what if there is disagreement?

Disputants before Vermont's Environmental Court, "as in most states . . . may utilize mediation via one of two routes: when there is consensus to try it, or in court when a judge orders mediation or a hearing officer suggests mediation at a prehearing conference."¹⁰⁹ In disputes before the PUC, parties should be enabled and encouraged to pursue mediation, if both or all interested parties consent to it, at any time in the proceedings.¹¹⁰ But, should the

¹⁰⁸ Alberta Energy Regulator, *Alternative Dispute Resolution Program and Guidelines for Energy Industry Disputes*, Manual 004, (June 2013), <http://www.aer.ca/documents/manuals/Manual004.pdf> [accessed Dec. 1, 2017].

¹⁰⁹ Patrick Field, Kate Harvey & Matt Strassberg, *Integrating Mediation in Land Use Decision Making*, *supra* n.100.

¹¹⁰ This stance is widely adopted, and specifically embodied in the AER's approach to ADR. *See* Alberta Energy Regulator, "Alternative Dispute Resolution," *supra* n.67.

facilitator, or the PUC more broadly, be able to compel mediation? Or should they only be empowered to encourage mediation? This question should be left to the PUC's judgment. Ultimately, a tension remains here. Parties who are compelled to mediate against their preferences are probably less likely to settle or compromise. On the other hand, those who might not be inclined to mediate might see the benefit in the process if forced to do so.

Addressing Potential Concerns

Additional stakeholder concerns include the following: too many parties could be privy to a screening meeting; a screening meeting may be more onerous, and potentially more time-consuming, than the present pre-hearing conference (which is focused solely on procedural issues, such as setting the schedule); that opposing parties may attempt to trigger negotiation in bad faith; and/or that a PUC facilitator empowered to compel mediation may require mediation that will be counterproductive.

In order to avoid these undesirable situations, the facilitator will have to be adept and skilled in actively listening to all parties. The facilitator will have to extract meaning from the statements made by parties, so that it is clear where conflict lies, and where there is room for conflict resolution. The facilitator will have to ask questions of the parties to get at their priorities, and determine whether parties have any room to compromise. The parties themselves will also have to be prepared for these meetings, and know their positions and interests in the matter.

The screening meeting will only truly succeed if parties engage in the dialogue in good faith, are ready to be flexible, and are willing to consider an alternative approach to the resolution of their dispute. Yet, if the PUC decides that the facilitator should have the power to compel mediation, the facilitator should do so only when mediation would be fruitful. Mediation would not, in that case, be universally mandatory, but could be mandatory at the facilitators' discretion.

Before requiring mediation, a facilitator should do everything in his or her power to:

- encourage the parties to agree to mediation on their own, so that there is party buy-in about the process;
- ensure that the parties fully understand the opportunity—for a better resolution, for savings of time and money—in mediation; and
- be reasonably certain that mediation could solve some or all of the issues at hand

Ultimately, though, the facilitator should be aware that mediation is not going to solve every case—some disputes will not be suited to mediation, and should be handled in the normal contested case process.

Interests Satisfied, and Tensions Implicated, by Recommendation 2

Interest / Tension	✕ / ✓	Description
Interest 1:	✓	So long as all interested parties are adequately represented in the screening meeting, and the number of parties involved in the screening meeting is not so high as to be unwieldy, parties will feel more included from the start of the ADR process.
Interest 2:	✓	Parties will save time and money if the facilitator of the screening meeting is able to help the parties, through facilitation or conciliation, engage in dispute resolution through negotiation.
Interest 3:	✓	The screening meeting will ensure that those entering in to ADR are doing so in good faith, and that those who want to genuinely engage to find a solution for all parties are able to do so in a constructive way.
Interest 4:	✕	
Tension 1:	✓	While a screening meeting will improve access, it may lead to MOUs and other agreements that are not preserved in an evidentiary record, and not based on scientific evidence so much as the ability of the parties to compromise. The PUC will have to approve settlements to avoid any obviously unfair outcomes.
Tension 2:	✕	
Tension 3:	✓	The facilitator in screening meetings will have to be skilled in ensuring that he or she remains neutral. He or she will also have to avoid discussion of the case with a mediator or case officer if the dispute proceeds beyond the screening meeting.

Recommendation 3:

Joint Fact-Finding & Shared Experts

We recommend parties use joint fact-finding mechanisms to conduct collaborative discovery.

Why Joint Fact-Finding?

According to many stakeholders, discovery is one aspect of the PUC's process that members of the public struggle with. Intervenors, particularly those acting *pro se*, generally do not understand the concepts of discovery, and the expense of hiring technical experts is a further barrier to effective discovery for many intervenors. Even when all parties have access to experts, the phenomenon of dueling experts, when each side presents contradictory scientific data, can also be problematic for the PUC and frustrating for the parties. Furthermore, discovery is essential to the PUC's current process, as it provides the scientific data the PUC relies on to make its decisions.

If parties collaborate during the discovery process, parties will still obtain scientific data on contested issues that can be used not only by the PUC to make a final decision but also by the parties to discover options for further problem-solving. Conducting discovery before mediation would address intervenors' concerns regarding the power imbalance that currently exists in PUC cases. Finally, collaborative discovery would alleviate stakeholder concerns that a mediated decision may not be based on scientific data, because decisions made by both the PUC and the parties would be informed by the results of discovery.

Specifically, we recommend that parties engage in joint fact-finding during discovery, facilitated by the PUC staff member who facilitated the screening meeting.¹¹¹ This recommendation addresses the following issues:

- What Is Joint Fact-Finding?
- Benefits of Joint Fact-Finding.
- When Joint Fact-Finding is Appropriate.
- When Joint Fact-Finding Should Not Be Used.
- The Joint Fact-Finding Process.
- Key Steps to Effective Joint Fact-Finding.
- Selecting Experts.

What is Joint Fact-Finding?

According to *The Consensus Building Handbook*, “[j]oint fact-finding offers an alternative to the process of adversary science when important technical or science-intensive

Joint Fact-Finding is:

- An alternative to adversary science.
- A route to formation of common assumptions and joint decision-making.
- A process allowing parties to maintain varying technical interpretations of data.

issues are at stake. Joint fact-finding ... extends the interest-based, cooperative efforts of parties engaged in consensus building into the realm of information gathering and scientific analysis.”¹¹² Broadly speaking, “[i]n joint fact-finding, stakeholders with differing viewpoints and interests work together to develop data and information, analyze facts and forecasts, develop common assumptions and informed opinion [*sic*], and, finally, use the information they have developed to reach

decisions together.”¹¹³

¹¹¹ See Recommendation 2.

¹¹² John R. Ehrmann and Barbara L. Stinson, *Joint Fact-Finding and the Use of Technical Experts*, in *The Consensus Building Handbook: A Comprehensive Guide to Reaching Agreement*, at 376 (Lawrence E. Susskind et al. 1999).

¹¹³ *Id.*

While parties work together to gather information in joint fact-finding processes, parties need not interpret the data they collect in the same manner: “Consensus-based processes invest decision-making responsibility in a group of stakeholders with diverse interests, not just in an elected or appointed decision maker. Joint fact-finding in a consensus process assumes that parties with conflicting interests will interpret technical material differently but that they ought to gather and develop facts and forecasts together.”¹¹⁴

Benefits of Joint Fact-Finding

Joint fact-finding offers participants many advantages not offered by traditional discovery. First, joint fact-finding allows parties to develop a common understanding of the complex and technical issues central to the problems they hope to solve, based on shared data.¹¹⁵ Building a common knowledge base can also help stakeholders with less expertise to learn more about the relevant issues, which in turn can allow parties to negotiate on a more equal playing field.¹¹⁶

Furthermore, joint fact-finding leads to better agreements.¹¹⁷ According to *The Consensus Building Handbook*, “[w]hen participants in a collaborative process conduct statistical analysis, risk assessments, surveys, or other types of joint research (or work with a

The Benefits:

- The ‘playing field’ is leveled.
- Parties develop a common understanding of issues, and build a common knowledge base.
- Agreements are based on the most accurate info, and are more creative.
- Agreements are more durable.
- Parties are more likely to reach an agreement in the first place.
- Inter-party relationships may be improved.

¹¹⁴ *Id.* at 377.

¹¹⁵ *See id.* at 378.

¹¹⁶ *See id.*

¹¹⁷ *See id.* at 379.

technical expert to do so), they have a better chance of identifying the most accurate information possible.”¹¹⁸ Since all parties now possess this accurate information, they can build credible agreements. Agreements constructed based on joint fact-finding efforts are also more creative. “When diverse stakeholders work together to gather and interpret data, they draw on each other’s experience, knowledge, and ideas. They can look for innovative ways to develop and use technical information to find an agreement that no single individual could have generated alone.”¹¹⁹ And agreements based on joint fact-finding are more durable, because “[i]f all parties who must support an agreement are involved in gathering and assessing the information on which that agreement is based, they are more likely to stand by the agreement that is ultimately reached.”¹²⁰ Finally, when joint fact-finding efforts are incorporated into a process in the first place, the parties are more likely to reach agreement than if there was no joint fact-finding.¹²¹ According to *The Consensus Building Handbook*, in processes governed by adversary science, “coalitions form behind technical experts or interpretations. Each side seeks to discredit the data offered by others. ... Parties working together, however, investing their ideas, time, and resources into jointly seeking good information, become devoted to reaching a mutually agreeable outcome and explaining that outcome to their constituencies and the public.”¹²²

Joint fact-finding also improves relationships between parties with differing interests. The process “fosters trust, enhances communication, and builds understanding—all of which make for a more productive consensus building process.”¹²³

Given stakeholder concerns about the imbalance of power in PUC cases, as well as the adversarial nature of the process as it stands now, the general lack of communication

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *See id.*

¹²² *Id.* at 379–80.

¹²³ *Id.* at 380.

between petitioners and intervenors during the process, and the public's distrust of the process on the whole, the process would likely benefit from joint fact-finding structures.

When Joint Fact-Finding is Appropriate

Cases where parties do not possess critical information necessary for decision-making, or cases in which such information is disputed, benefit from joint fact-finding efforts.¹²⁴ Joint fact-finding is also effective in cases involving highly technical and/or science-intensive decision-making.¹²⁵ Furthermore, parties with “a long history of disagreement and poor relationships” can benefit from collaborative research.¹²⁶ Finally, joint fact-finding can help break a deadlock around factual issues.¹²⁷

PUC cases hinge on highly technical, science-intensive information. This information can also either be unknown or disputed at the start of a case. Finally, while the specific parties to any given PUC case may not have prior experience working together, the general distrust and lack of communication between the utilities and intervenors, based on experiences of others involved in contentious PUC cases, means the parties likely have a poor relationship from the start. All of these factors indicate that PUC cases would benefit from joint fact-finding processes. Furthermore, early outreach from petitioners to open a dialogue, in conjunction with a screening meeting to encourage further dialogue and collaboration, will prime parties to work together in a joint fact-finding process to gather information in a noncompetitive way.

¹²⁴ *See id.* at 380, 383.

¹²⁵ *See id.*

¹²⁶ *See id.* at 380, 383–84.

¹²⁷ *See id.* at 380.

When Joint Fact-Finding Should Not Be Used

The Consensus Building Handbook says joint fact-finding should not be used “in cases in which there are significant power imbalances among the parties, ... and powerful parties are seeking to use joint fact-finding to reinforce that imbalance.”¹²⁸ Similarly, “[w]hen there is a severe disparity in expertise, joint fact-finding may not be appropriate if ways cannot be found to equalize access to expertise.”¹²⁹

Given stakeholders concerns about power imbalances and differing levels of technical sophistication amongst parties, these are significant issues that must be addressed for joint fact-finding to effectively assist parties in reaching a mutually beneficial agreement. *The Consensus Building Handbook* states that neutral parties such as mediators or facilitators can assist in the joint fact-finding effort by aiding parties with less expertise and mediating disputes over the process of the joint fact-finding.¹³⁰ We recommend that a facilitator, perhaps the same facilitator who engaged the parties in the screening meeting, work closely with the parties during the joint fact-finding process to keep the playing field equal and ensure that no party attempts to abuse or take advantage of the process.

Other factors that may indicate joint fact-finding is inappropriate for a particular case include: parties do not believe they can construct a fair fact-finding process, fact-finding cannot be “effectively integrated into a dispute resolution” process, there are insufficient resources to complete a satisfactory process, or parties cannot agree on a plan for conducting joint fact-finding.¹³¹

¹²⁸ *Id.* at 385.

¹²⁹ *Id.*

¹³⁰ *See id.* at 397.

¹³¹ *See id.* at 385.

Table 3: When to Use Joint Fact-Finding

Yes to Joint Fact-Finding ✓□	No to Joint Fact-Finding ✕
<ul style="list-style-type: none"> • Highly technical / science-intensive decision-making. • Cases where information is lacking, or disputed. • Cases where parties have a history of mistrust. • Cases where a deadlock around factual issues needs to be broken. 	<ul style="list-style-type: none"> • Cases where there are significant inter-party power imbalances. • Cases where there is a severe disparity in expertise. • Cases where parties have no buy-in regarding joint fact-finding and its appropriateness or fairness. • Cases where parties cannot agree on a plan of action for the joint fact-finding. • Cases where there is not funding for joint fact-finding.

The Joint Fact-Finding Process

The Consensus Building Handbook says, “Joint fact-finding procedures can be tailored to almost any consensus building effort.”¹³² The *Handbook* cautions, however, that joint fact-finding should only be used when fully incorporated into a process, meaning “explicit ground rules have been developed for conducting the joint research and ... participants have agreed on a way to incorporate the results of this effort back into the deliberations of the consensus building group.”¹³³ Furthermore, all stakeholders must be involved in designing the joint fact-finding process.¹³⁴

Therefore, to successfully implement joint fact-finding into the discovery portion of the PUC’s case process, participants must agree at the outset to what degree joint fact-finding processes will be used to conduct discovery and how any information gathered during these processes will be used in future mediation. Any information gathered will need

¹³² *Id.* at 384.

¹³³ *Id.*

¹³⁴ *See id.*

to become part of the evidentiary record, and information must be sufficient for the PUC to rely on either to approve an agreement between participants or to make a decision should parties fail to reach an agreement.

In designing a joint fact-finding process for a specific case, participants must bear in mind that the goal of joint fact-finding is to “increase, not detract from, the fairness of a negotiation.”¹³⁵ For example, *The Consensus Building Handbook* says it would be inappropriate for a party, or set of parties representing one side of a case, to pay for an outside expert, unless all parties agree to such an arrangement.¹³⁶ Funding joint fact-finding processes will be discussed in more detail in the funding section below, but “no single interest-group’s perspective should dominate simply because it has more resources.”¹³⁷ Furthermore, parties must agree to joint fact-finding, as forcing the process on unwilling participants will damage the collaborative tone of the process and make it less effective.¹³⁸ The same is true if joint fact-finding seems disconnected from the issues under discussion.¹³⁹

Finally, joint fact-finding can be expensive and time-consuming.¹⁴⁰ Yet without joint fact-finding, parties in a PUC proceeding would still need to conduct discovery individually. Joint fact-finding would not be equivalent to shifting costs from the petitioner onto the intervenor, because instead of each party hiring its own experts, the parties would be sharing the costs of discovery. Sharing the burden of discovery should decrease, rather than increase, the overall cost of the process¹⁴¹ while also decreasing the contentiousness of the matter and increasing the likelihood of settlement. However, sufficient funds need to be

¹³⁵ *Id.*

¹³⁶ *See id.*

¹³⁷ *Id.* at 385.

¹³⁸ *See id.* at 384–85.

¹³⁹ *See id.*

¹⁴⁰ *See id.* at 385.

¹⁴¹ See “Funding ADR” section below for a full discussion on how costs can be borne equitably without compromising neutrality.

available “to ensure that all parties have a fair opportunity to have input into a fact-finding process.”¹⁴²

Key Steps for Effective Joint Fact-Finding

Figure 4: Participant Agreement on Joint Fact-Finding



Joint fact-finding “comes in many shapes and sizes” and can be shaped to particular cases and situations.¹⁴³ It can occur at the beginning of a process or it can be integrated into a process later on should key information be found to be missing or should parties find themselves in a deadlock.¹⁴⁴ However joint fact-finding is undertaken in the process, there are five key steps to make joint fact-finding effective and useful for building a better agreement.

- Participants must determine the scope of the inquiry: What issues must be researched? What information is needed to answer questions and address concerns raised by participants?¹⁴⁵
- Participants must design a process for gathering this key information and answering these key questions.¹⁴⁶
- Participants must determine the specific questions to be asked of experts or participant fact-finders as well as the method of analysis to be used.¹⁴⁷

¹⁴² John Ehrmann & Barbara Stinson, *supra* n.112, at 385.

¹⁴³ *See id.* at 391.

¹⁴⁴ *See id.*

¹⁴⁵ *See id.*

¹⁴⁶ *See id.*

- Participants must determine and recognize “any limitations on the analytical methods to be used.”¹⁴⁸
- Participants must determine the best way to proceed once the information is available.¹⁴⁹

At any point, parties may delegate tasks to a subset of the group, as long as the smaller working group’s process is transparent to the larger group.¹⁵⁰

Selecting Experts

Parties in a joint fact-finding process may gather and analyze information themselves, or they may choose to hire experts.¹⁵¹ If parties possess scientific or technical expertise, a subgroup of parties themselves can gather and analyze data.¹⁵² One benefit to participants conducting the fact-finding is that “[i]t increases the analytical capabilities and knowledge of all representatives, creating a more level playing field.”¹⁵³ The smaller fact-finding subgroup can be composed of any party who wishes to join or else limited to those parties with technical expertise.¹⁵⁴ *The Consensus Building Handbook* recommends constructing a working group that is open to all interested participants but certainly includes those with technical expertise.¹⁵⁵

While it is possible that parties to a PUC case may have technical or scientific expertise and other parties are comfortable relying on those individuals’ expertise, in most PUC cases, parties will likely need to hire technical experts. The process of selecting and hiring experts involves a small consensus building process in and of itself, and thus it

¹⁴⁷ *See id.*

¹⁴⁸ *Id.*

¹⁴⁹ *See id.*

¹⁵⁰ *See id.* at 386.

¹⁵¹ *See id.*

¹⁵² *See id.*

¹⁵³ *Id.* at 387.

¹⁵⁴ *See id.*

¹⁵⁵ *See id.*

naturally will take some time. Stakeholders indicated concerns that experts in Vermont have built their careers on testifying on one side or the other of the PUC process. However there may be some experts who “have the appropriate expertise and will be acceptable to all parties.”¹⁵⁶ Participants should “work hard to accommodate each other’s interests in the selection process.”¹⁵⁷ It can help to search for experts outside the region, though this will increase the cost.¹⁵⁸ If parties can agree on an expert, parties can hire one individual expert.¹⁵⁹ On the other hand, because of “the complex dynamics that typically characterize science-intensive consensus processes, ... it may not be possible to find one individual who is trusted by all parties or has sufficient breadth of expertise to be helpful.”¹⁶⁰ Should this be the case, participants can choose to hire multiple experts or a consulting firm or else utilize resources of academic institutions.¹⁶¹

Once participants identify the type of expert or experts they wish to hire, they “must define criteria for the selection of those experts, identify potential sources of candidates, and determine a fair process for selection. They should also develop a budget for technical services and identify potential sources of funding.”¹⁶²

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 397.

¹⁵⁸ *See id.*

¹⁵⁹ *See id.* at 387.

¹⁶⁰ *Id.* at 388.

¹⁶¹ *See id.* at 387–89.

¹⁶² *Id.* at 389.

Conclusions

In summary, we recommend that the PUC integrate joint fact-finding into the current discovery process in order to make discovery more collaborative, obtain more accurate information, level the playing field before mediation, and ultimately position the parties to come to a mutually beneficial agreement. The goal of joint fact-finding is for parties to collaboratively and transparently gather credible information, while keeping in mind that, “It is quite appropriate ... for the parties to interpret the data differently, driven by their varying interests.”¹⁶³ Ideally, parties will utilize the framework outlined above to determine important issues on which to conduct discovery and agree on and hire technical experts as a group. However parties should not be forced into joint fact-finding, and if parties are unwilling or cannot come to an agreement on which experts to hire, joint fact-finding to this degree should not be pursued. At the very least, however, parties should engage in the initial steps outlined above and jointly determine what information needs to be gathered, what kind of experts should be hired (even if experts are hired by individual parties), what specific questions experts should answer, and what type of analysis will be completed and its limitations. A neutral third party should participate in joint fact-finding to facilitate the process and ensure parties remain on an equal footing.

Joint Fact-Finding:
“allowing parties to collaboratively and transparently gather credible information.”

¹⁶³ *Id.*

Interests Satisfied, and Tensions Implicated, by Recommendation 3

Interest / Tension	✗ / ✓	Description
Interest 1	✓	Inclusivity will be improved as joint fact-finding will improve the tone of the process and help rectify the power imbalance.
Interest 2	✓	Joint fact-finding will simplify the discovery process, which intervenors find confusing. It will also likely decrease discovery costs as parties now share costs of joint discovery rather than bearing the cost of individual discovery.
Interest 3	✗	
Interest 4	✗	
Tension 1	✓	Joint fact finding will allow parties to have confidence in decisions reached by ADR because these decisions will still be based on rigorous analysis of scientific data. Joint fact-finding will also make the process more accessible for intervenors with less expertise.
Tension 2	✗	
Tension 3	✓	A PUC staff member facilitating joint fact-finding will satisfy stakeholder interests in increased contact with and guidance from the PUC throughout the process, and as the PUC would be facilitating process rather than substance, it would still be neutral.

Recommendation 4:

Resolve Siting Disputes through Mediation

We recommend that parties engage in formal mediation at least once over the course of a PUC case. The exact process of the mediation should be flexible.

Why Mediate?

In PUC cases, formal mediation would benefit parties by assisting them to communicate effectively about their interests, develop creative options that could satisfy those interests, and ultimately reach a mutually beneficial agreement. A skilled mediator can also establish ground rules and utilize various ADR processes to remedy the power imbalance at the table.

This section discusses the mediation programs at the Federal Energy Regulatory Commission (FERC) and the California Public Utility Commission (CPUC). It also discusses specific options for structuring mediation at the PUC to satisfy stakeholder interests and mitigate stakeholder concerns.

The Federal Energy Regulatory Commission’s Dispute Resolution Service

FERC’s Dispute Resolution Service offers mediation and facilitation services to resolve energy disputes as well as training in ADR skills.¹⁶⁴ FERC defines mediation as “the intervention into a dispute or negotiation of an acceptable, impartial and neutral third party who has no decision-making authority. The objective of the third-party neutral is to assist

¹⁶⁴ “Dispute Resolution Service (DRS),” FERC (Apr 12, 2017), <https://www.ferc.gov/about/offices/oaljdr/drs.asp> [accessed Nov 24, 2017].

the parties in voluntarily reaching an acceptable resolution of the issues in dispute.”¹⁶⁵ Mediation at FERC is voluntary and confidential, whether or not an agreement is reached.¹⁶⁶ Engaging in mediation in disputes at the FERC also does not preclude other alternate dispute resolution approaches. Furthermore, FERC says, “Professional mediators are trained in developing ways to involve key stakeholders to the dispute. A skilled mediator should be able to work in dual-party to multi-party contexts in which the mediator has to be both an excellent facilitator and an organizational manager. In the multi-party context, the parties need a neutral who can assist a diverse group of interested parties in solving a complex set of issues in an organized way.”¹⁶⁷

In the mediation process at FERC, the mediator makes procedural and substantive suggestions that may help parties to reach agreement.¹⁶⁸ The mediator may work with parties individually to explore interests and options that satisfy those interests.¹⁶⁹

The key to a successful mediation process is that the parties work with the mediator to develop a process that meets their needs, and determine what role they want the mediator to play.

FERC says that individual mediators differ in the level of “directiveness” they bring to the table.¹⁷⁰ Many mediators focus on building relationships by helping the parties to collaboratively resolve their dispute with creative solutions.¹⁷¹ But according to FERC, the key to a successful mediation process is that “the parties work with the mediator to develop a process that meets their needs, and determine what role they want the mediator to play.”¹⁷²

¹⁶⁵ “Common Dispute Resolution Approaches,” *supra* n.10.

¹⁶⁶ *See id.*

¹⁶⁷ *Id.*

¹⁶⁸ *See id.*

¹⁶⁹ *See id.*

¹⁷⁰ *See id.*

¹⁷¹ *See id.*

¹⁷² *Id.*

The California Public Utility Commission's ADR Program

The California Public Utility Commission (CPUC) has a robust ADR program, which offers facilitation, mediation, early neutral evaluation, and settlement conferences.¹⁷³ The Administrative Law Judge (ALJ) division administers the CPUC's ADR program, and trained, experienced ALJs serve as neutral mediators, facilitators, or settlement judges.¹⁷⁴

The CPUC's ADR program operates under five core principles: voluntariness, confidentiality, timeliness, good faith, and commission approval.¹⁷⁵ Mediation is usually voluntary and always confidential.¹⁷⁶ While ADR is usually voluntary, ALJs can require

CPUC's Five Core Principles:

1. Voluntariness
2. Confidentiality
3. Timeliness
4. Good Faith
5. Commission Approval

parties to attend facilitated workshops or settlement conferences or to meet with neutrals to "determine the feasibility of mediation or early neutral evaluation."¹⁷⁷

Confidentiality is essential in ADR processes, because it provides parties with security so they can feel comfortable

expressing the interests underlying their positions in the dispute.¹⁷⁸ The goal of mediation is to shorten, not lengthen, the case process.¹⁷⁹ Furthermore, parties must engage in mediation in good faith, with intentions to compromise and reach agreement, not to delay or gain a tactical advantage.¹⁸⁰ Finally, agreements reached through ADR will be expeditiously

¹⁷³ See "Alternative Dispute Resolution Program," California Public Utility Commission, *supra* n.64.

¹⁷⁴ See *id.*

¹⁷⁵ See "Basic Principles of ADR," California Public Utility Commission, <http://www.cpuc.ca.gov/General.aspx?id=3965> [accessed Nov 26, 2017].

¹⁷⁶ See *id.*

¹⁷⁷ *Id.*

¹⁷⁸ See *id.*

¹⁷⁹ See *id.*

¹⁸⁰ See *id.*

approved by the Commission if they are legally sufficient.¹⁸¹ The CPUC will approve decisions reached through ADR if they are legally sufficient and if they conform to public policy and ethical guidelines established by the CPUC.¹⁸²

We spoke directly with the CPUC ADR coordinator, ALJ Kimberly Kim, on November 21, 2017. She said that in her experience with the program, ADR does in fact shorten the case process. Even if only a partial settlement is achieved, ADR substantially narrows the issues and minimizes costs for parties (the ADR program is administered at no charge to participants). She also said that if the ALJ neutrals do not feel parties are engaging in ADR in good faith, the ADR process is not allowed to proceed, and the parties return to the formal hearing process. Finally, she described some of the mechanisms judges use to manage the power imbalance often present in CPUC cases. For example, judges may use private caucuses, so that all parties have equal speaking time with the ALJ mediator. Judges do not permit parties to have more than one attorney at the table, and they may conduct lawyer-free sessions or sessions that involve only parties with technical expertise. If one party is attempting to use the power imbalance to their advantage, the mediator will determine the root of the problem and take steps to stop it.

In mediation for CPUC cases, “With parties’ consent, [the] case is referred to a trained ALJ mediator who holds joint and separate confidential meetings with parties to identify underlying interests and settlement approaches for resolving a dispute.”¹⁸³ The CPUC’s website says since each case is unique, each ADR process is unique to that case, but there are some general steps that occur in the process: the parties request, or the ALJ assigned to the case suggests, that the parties engage in ADR; the ADR coordinator determines which type of ADR (facilitation, mediation, early neutral evaluation, or

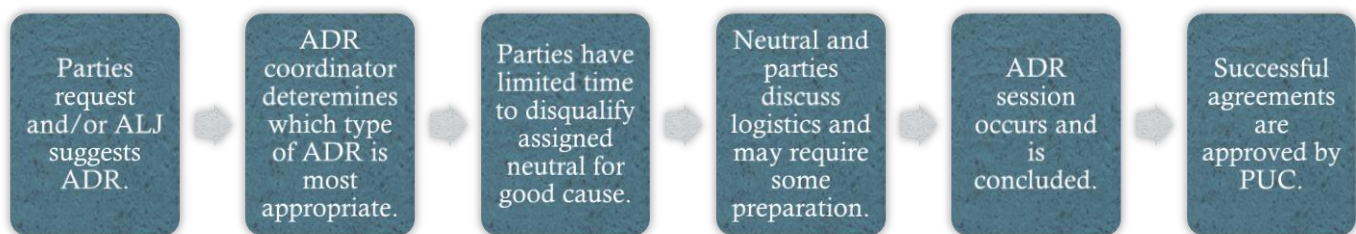
¹⁸¹ *See id.*

¹⁸² *See id.*

¹⁸³ *See* “What Happens During ADR,” California Public Utility Commission, <http://www.cpuc.ca.gov/General.aspx?id=4077> [Accessed Nov 26, 2017].

settlement conference) is most appropriate and assigns an available neutral to the process; parties have a limited time to disqualify the assigned neutral for good cause and request a different neutral; the neutral discusses logistics with the parties and has them execute a standard confidentiality agreement; the ALJ neutral may require parties to do some preparation for the session; the ADR session occurs and is concluded, successfully or unsuccessfully; successful agreements are approved by the Commission; parties implement the agreement; and parties are requested to evaluate the ADR program.¹⁸⁴ Most ADR sessions last only half a day to two days, and while ADR most often takes place in San Francisco, the ALJ can travel to a more convenient location for the parties.¹⁸⁵

Figure 5: CPUC Mediation Steps



There are several scenarios for which the CPUC deems ADR inappropriate: “Disputes over purely legal issues do not lend themselves to ADR. Also, ADR may not help in many rulemaking proceedings where the Commission must make a policy decision. Even in these cases, ALJs may facilitate workshops and conferences to identify and evaluate policy options.”¹⁸⁶

In approving Resolution ALJ-185, which established the ADR program, the Commission indicated, “We believe ADR offers great potential to the [CPUC], and all who

¹⁸⁴ *See id.*

¹⁸⁵ *See id.*

¹⁸⁶ “Alternative Dispute Resolution Program,” *supra*, n.64.

practice before the [CPUC], for improving decision-making processes in formal proceedings and certain other disputes.”¹⁸⁷ According to the CPUC, “[w]hen successful, ADR may achieve results that a court or agency could not order, give the parties more ownership in the result, and reduce litigation and agency costs.”¹⁸⁸

Mediation at the Vermont Public Utility Commission

Neutrality

It is essential that parties trust the mediator and see the mediator as legitimate.¹⁸⁹ Parties’ trust and confidence in the mediator are essential, because “effective intervention frequently requires the confidential exchange of information and ideas, and because a practitioner must often probe, test, and challenge parties in their efforts to make sense of a conflict and its resolution.”¹⁹⁰ Therefore, a mediator must “remain neutral concerning the content of a group’s work” and must have “little or no decision-making authority within a group.”¹⁹¹ A mediator, however, works not only to manage interactions between parties within meetings, but also seeks to enhance the negotiation by managing dynamics between parties outside of meetings.¹⁹² A mediator can also assist the parties by making substantive suggestions,¹⁹³ further underscoring the need for neutrality and legitimacy in the parties’ eyes.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ See Michael L. Poirier Elliot, *The Role of Facilitators, Mediators, and Other Consensus Building Practitioners*, in *The Consensus Building Handbook: A Comprehensive Guide to Reaching Agreement* at 209 (Lawrence E. Susskind et al. 1999).

¹⁹⁰ *Id.* at 218.

¹⁹¹ *Id.* at 208–09.

¹⁹² See *id.* at 209.

¹⁹³ See Common Dispute Resolution Approaches,” FERC, *supra*, n.10.

Issues to consider in determining how to select a mediator for formal mediation processes will be discussed below¹⁹⁴, but neutrality of not only the mediator but also the process is essential for success of the mediation.

Confidentiality

Because mediation asks parties to explore and reveal the personal interests motivating their positions within the dispute, confidentiality within mediation is key to mediation's success.¹⁹⁵ Without the assurance of confidentiality, parties would be considerably less willing to discuss their personal interests, especially given the chance that whatever they say could be used against them in a hearing. This atmosphere of distrust and guardedness is ill-suited to collaborative problem solving. Mediation at the PUC should therefore be confidential, however there are ways to ensure the process is still inclusive and transparent.¹⁹⁶

Options for Structure of Mediation for the PUC

According to *The Consensus Building Handbook*, the mediation process is flexible, and mediators can utilize different forms of interactions to best facilitate communication and problem-solving, as utilized in both FERC and CPUC mediations, including plenary discussions with all participants, caucuses, work groups, one-on-one discussions, and shuttle diplomacy.¹⁹⁷

The Consensus Building Handbook recommends a mediator begin the process with a series of convening interviews to build a rapport between the mediator and each individual party: "These interviews, which are designed to assess the conflict and existing relationships, provide a vehicle for opening dialogue between the mediator and each

¹⁹⁴ See the "Who Mediates? Who Facilitates? Who Participates?" section, below.

¹⁹⁵ See "Basic Principles of ADR," *California Public Utility Commission*, *supra* n.175.

¹⁹⁶ See "Who Facilitates? Who Mediates? Who Participates?" below.

¹⁹⁷ See Poirier Elliot, *supra* n.189, at 208.

party.”¹⁹⁸ Presently, stakeholders have indicated poor relationships between the petitioners and the intervenors in PUC cases, so these interviews—guided by a mediator with their eye on the relationship between the parties—may be effective, though these interviews may also increase the length of a mediation. On the other hand, conducting interviews can help the mediators work with the parties to decide “who should be represented at the table.”¹⁹⁹ During the first plenary mediation session, the mediator can also efficiently lay out the parties’ underlying interests based on the convening interviews.²⁰⁰

At this time, the mediator should also suggest ground rules to guide participants’ conduct throughout the process, modify these ground rules if participants feel it is necessary, and obtain agreement to abide by these ground rules from participants.²⁰¹

According to *The Consensus Building Handbook*, “[t]ypically ground rules cover three facets of the negotiation: the process (e.g., decision-making procedures, communication with the press, attendance at meetings), the agenda (e.g., range of issues to be addressed, the introduction and use of data, time line), and behavior (e.g., prohibition on

Establishing Ground Rules:

- Determining the process
- Setting the agenda
- Establishing expectations for party behavior

personal attacks, rules for governing information exchange).”²⁰² Establishing ground rules further works to improve relationships between participants and would therefore also be helpful for PUC cases.

If a PUC case is particularly large and complex, the mediator may decide to establish working groups to examine particular issues.²⁰³ This would be especially helpful if there is

¹⁹⁸ *Id.*, at 225.

¹⁹⁹ *Id.*, at 226; see also “Who Facilitates? Who Mediates? Who Participates?” below for a full discussion of representative participation and which parties should be actively present for a mediation.

²⁰⁰ See Poirier Elliott, *supra* n.189, at 227.

²⁰¹ See *id.*

²⁰² *Id.*

more than one issue that needs to be mediated and not all parties are concerned about all issues. It would also be helpful if the issue in question is particularly difficult.²⁰⁴

A mediator may also use shuttle diplomacy, as suggested by some stakeholders. In shuttle diplomacy, the mediator “transmits information between groups.”²⁰⁵ Shuttle diplomacy could be effective at balancing the unequal amounts of power parties currently have in PUC processes.

Throughout the process, a mediator may also work off a single negotiating text, “a document that describes the key issues and associated options for resolution, with areas of

Benefits of the Single Negotiating Text:

- Improves participants’ understanding of the issues
- Increases efficiency of the negotiation
- Encouraging transparency through confidentiality
- Can be viewed outside with consent by all parties

agreement clearly defined and areas of disagreement presented for further discussion.”²⁰⁶ Creating a single negotiating text is an iterative process.²⁰⁷ The mediator uses notes taken during the initial meeting between the parties to draw up a document containing statements of interests, areas of disagreement, and possible areas of agreement, which may include possibilities suggested by the mediator as well. As the process continues, the mediator presents the text to the parties, either in a

plenary session, in caucuses of individuals with similar interests, or individually, to refine the document.²⁰⁸ The single negotiating text becomes “increasingly specific” as the process continues.²⁰⁹ Utilizing a single negotiating text can be beneficial to mediators and parties

²⁰³ See *id.*, at 228.

²⁰⁴ See *id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*, at 222–23.

²⁰⁷ See *id.* at 223.

²⁰⁸ See *id.*

²⁰⁹ *Id.*

because it “improve[s] participants’ understanding of the issues and increas[e] the efficiency of a negotiation.”²¹⁰ A single negotiating text would be a strong option for the PUC cases, where stakeholders are particularly concerned with efficiency as well as the transparency that a single negotiating text would provide. The single negotiating text would still be considered confidential, so it would not be transparent to parties outside the mediation unless all parties agreed to release it, but would permit parties to be transparent with each other within the mediation process. Beyond the benefits of efficiency and transparency using a single negotiating text would hold for the PUC, it would also help improve the tone of the process because parties who are open and honest with each other about their interests and possible options build trust and therefore build stronger relationships.

Interests Satisfied, and Tensions Implicated, by Recommendation 4

Interest / Tension	× / ✓	Description
Interest 1	✓✓	Mediation will help improve the tone of the process, and a skilled mediator will be able to mitigate the power imbalance.
Interest 2	✓✓	Parties sitting down to talk through issues and options and come to a mutually beneficial agreement will simplify the process and decrease the length (and therefore the costs, of the project.
Interest 3	✓✓	A skilled mediator will be able to detect when a party is attempting to abuse the mediation process.
Interest 4	✓✓	Mediation should be confidential but it is possible to make sure the process is still transparent.
Tension 1	××	
Tension 2	✓✓	Mediation should be flexible to accommodate differences in cases.
Tension 3	✓✓	Mediation should be as neutral as possible given the sensitive nature of information revealed throughout the process.

²¹⁰ *Id.*

Informing the Recommendations: Principles & Details

Having laid out the proposed ADR system—a comprehensive system stretching from the period before disputes have even arisen, until after they have been resolved—it is also important to discuss various themes intersecting with this ADR system. The following themes are most relevant, and were consistently encountered in research: when should ADR take place?; who should facilitate or mediate?; who should cover any additional expenses stemming from ADR?

Timing of ADR—Triggering Informal Processes

Many stakeholders opined on when would be the best point in the process for ADR to be triggered, and for the formal, litigated case process to be abandoned. The proposed ADR system, as a whole, is not to be triggered at a certain point in the siting process, but is rather supposed to be overlaid upon the entirety of the process. That said, certain aspects of the system might arise at distinct times.

- In order for community outreach to be effective, it should take place before a petition is filed (per Recommendation 1).
- The preliminary screening meeting should take place after the petition has been filed and parties have been identified, but before hearings take place (per Recommendation 2).
- Joint fact-finding should take place after the preliminary screening meeting, in place of traditional discovery during the current case process (per Recommendation 3).

More importantly, though, parties must be enabled to trigger subsequent screening meetings (acting as sessions for facilitation or conciliation), and formal mediation with flexibility. We look, here, to the Alberta Energy Regulator as an example. Before the AER, “ADR is available through the life cycle of an energy development, as well as before an

application is filed, during the application review, and for operational concerns, including reclamation.”²¹¹ This same flexibility should be adopted by the PUC.

Should the parties request conciliation, facilitation, or formal mediation, at any point following the submission of the petition, the PUC should encourage and facilitate this request. While there are benefits and drawbacks to engaging in conciliation, facilitation, or mediation as early as possible, after some discovery, or after all discovery has been completed—most importantly, that earlier mediation means higher potential cost savings but allowing more time for joint fact-finding means minimizing power imbalances—no one point is clearly the ‘best’ point to engage in ADR. With that in mind, the parties should be empowered to agree to their own ‘off-ramps,’ points where they agree it would be best to exit the formal proceeding and engage in informal ADR.

Who Facilitates? Who Mediates? Who Participates?

It is essential in any ADR process to determine: who will act as mediator or facilitator, who will participate in the process, and if any other roles are necessary for the process.

Stakeholders expressed many concerns in this area. First, stakeholders need to trust the process as well as the competency, expertise, and neutrality of the facilitator and mediator. Stakeholders are also interested in minimizing the costs of the process, both in terms of time and money. Intervenors said that all parties need to have a place at the ADR table, and while petitioners agreed, they would like to keep the number of parties to a minimum to keep the process as simple and efficient as possible. Specifically, petitioners believe that some intervenors’ interests may already be represented by other parties at the

²¹¹ Alberta Energy Regulator, “2015 Alternative Dispute Resolution Summary,” <http://www.aer.ca/documents/reports/ADRAnnualReport-2015.pdf> [accessed December 3, 2017].

table. Nevertheless, the settlement process must be transparent. Our recommendations attempt to address all of these concerns.

Recommendations Summarized:

- The ADR screening process should be conducted by a member of the PUC staff other than the hearing officer for the case.
- This same PUC staff member should facilitate joint fact-finding during discovery.
- Mediation should be conducted by a skilled outside mediator with expertise in utility regulation. The PUC should maintain a roster of appropriate outside mediators from which parties can choose.
- ADR should not take place before intervenor status is decided and all parties are identified.
- Identity of participants in mediation should depend on the particular case. Some options:
 - All parties represent themselves.
 - Parties with similar interests decide on representatives to mediate on their behalf.
 - Specific issues involving limited numbers of parties are mediated separately.
- All parties not actively participating in mediation should be permitted to observe the mediation.
- Parties may wish to include a resource person or technical adviser in the process to advise on technical or scientific details or legal issues.

The Facilitator and the Mediator

According to *The Consensus Building Handbook*, a facilitator's role is "to help groups hold productive meetings."²¹² On the other hand, "a mediator is trained to help parties negotiate productively" to reach agreements.²¹³ Some mediators may also have training to work with large groups.²¹⁴ Put another way, facilitators need "the ability to understand the context, ability to design and manage the process, and impartiality."²¹⁵ Effective mediators

²¹² Susan Carpenter, *Choosing Appropriate Consensus Building Techniques and Strategies*, in *The Consensus Building Handbook: A Comprehensive Guide to Reaching Agreement* at 94 (Lawrence E. Susskind et al. 1999)

²¹³ *Id.*

²¹⁴ *See id.*

²¹⁵ Poirier Elliott, *supra* n.189, at 231.

must have these skills as well, along with the “ability to handle sensitive information.”²¹⁶ In discussing the advantages of utilizing facilitators or mediators from within a stakeholder organization, *The Consensus Building Handbook* says that “[i]n general, an organization seeking to resolve a dispute through consensus building must make a trade-off between expense and ease of access, on the one hand, and impartiality, capacity to deal with sensitive information, and possibly skills and objectivity, on the other. As issues of confidentiality and impartiality increase, the need to go outside a stakeholding organization also increases.”²¹⁷ According to the *Handbook*, in most disputes, mediators should be external third parties, but facilitators could come from within a stakeholding organization, especially when “disputes spring from within a single organization, the issues are relatively clear and demarcated, the facilitator has no interest in the outcome of a decision, and the roles and responsibilities of the facilitator are clear and well understood by participants.”²¹⁸

For PUC processes, this means that using internal personnel—PUC or PSD staff members—for facilitation or mediation may be more cost effective and convenient, but it may come at the expense of stakeholder trust, especially given public concerns about the PUC’s neutrality.

During the ADR screening process and even during joint fact-finding, parties will not be making substantive decisions about the issues. Rather, they will be making decisions about process. A facilitator therefore seems appropriate to screen parties for effectiveness of ADR and to help guide joint fact-finding processes. Given stakeholders concerns about minimizing costs, as well as a desire for more contact with and guidance from the PUC throughout the case, we recommend that this facilitator be a member of the PUC staff, though not the hearing officer for the case.

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.*

On the other hand, in any formal mediation that may take place throughout the process, we recommend that the parties jointly select an outside mediator whom all parties believe will be impartial. This mediator should be skilled at mediation and have expertise in the subject matter of the case, and to assist parties in selecting a mediator, the PUC should compile a roster of potential candidates similar to the roster maintained by the Environmental Division of the Vermont Judiciary.²¹⁹

The Participants

Ideally, all parties will participate in the ADR screening process and joint fact-finding. But depending on the case, all parties may not need to participate in mediation. Similarly, and again depending on the case and structure of mediation processes, all parties may not need to participate in all aspects of mediation. To decide which parties should participate in mediation, *The Consensus Building Handbook* recommends, “determining an appropriate form of participation, identifying key interests, determining an optimal number of participants, and selecting individuals to take part.”²²⁰

Formal mediation can utilize either open participation or representative participation. In open participation, all individuals affected by the case can participate, and in representative participation, individuals represent a larger group of parties with shared interests.²²¹ Mediation in a PUC case could use either form of participation, depending on the number of parties and whether interests overlap sufficiently to allow for representative participation.

Open participation is most effective “when the number of people involved is manageable, interest in the issue is high, and any agreement will require broad-based

²¹⁹ “Mediation,” Vermont Judiciary, <https://www.vermontjudiciary.org/environmental/mediation> [accessed Dec 4, 2017]

²²⁰ Carpenter, *supra* n.212, at 90.

²²¹ *See id.*

support for implementation.”²²² *The Consensus Building Handbook* gives an example of a hypothetical company of twenty people which involves all staff in a decision about new office equipment, or a developer who invites “all adjacent neighbors to participate in design decisions for a new housing and park project.”²²³ When open participation is utilized, “those who have a stake in an issue will not feel left out or compelled to complain that a process was not inclusive. Open participation enhances ownership of an agreement among all affected people.”²²⁴

If open participation is impractical—if the issue being mediated involves a large number of affected people or the time necessary for full participation is excessive—mediation can be conducted via representative participation.²²⁵ In representative participation, “individuals who represent different interests and concerns are designated to participate on behalf of other individuals who share the same concerns.”²²⁶ Representatives maintain contact with their constituents throughout the process.²²⁷ According to the *Handbook*, “[p]rocesses involving public issues frequently use a representative form of participation, but allow nonparticipants to attend meetings as observers.”²²⁸

All parties to a case should agree on the form of participation to be used in mediation. If open participation is selected, all parties will participate in mediation. If representative participation is selected, parties must determine who should represent which interests. To identify representatives, parties should begin by identifying the key interests and concerns of affected people, because each area of concern must be represented.²²⁹ For example, if multiple neighbors to a proposed project intervene in a PUC case to oppose the

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *See id.*

²²⁶ *Id.*

²²⁷ *See id.*

²²⁸ *Id.*

²²⁹ *See id.*, at 92.

project, these citizens may or may not have similar interests such that they could be represented by a single party. If parties in a PUC case agree to use representative participation in mediation, they must be certain that all perspectives are in fact represented.

For large siting cases at the PUC, which could potentially involve many intervenors, representative participation may be appropriate, though it may not be possible to have one neighbor represent all neighbors, particularly if the project spans a large geographic area, like a pipeline. Smaller siting cases will likely involve fewer intervenors and may not require representative participation to be productive. On the other hand, we have heard from stakeholders about small siting projects involving more than sixty intervenors, so size of the project may not be a good indicator of which form of participation is most appropriate. Given the small size of the project in a smaller siting case, for example, it may be possible to simplify the process by utilizing representative participation: A group of neighboring landowners in a small siting case could share the same concerns and could be effectively represented by a single neighbor.

An appropriate number of participants must also be identified for representative participation.²³⁰ “This decision will be influenced by the nature of the issue, the number of interest categories involved, and the level of interest in participating.”²³¹ *The Consensus Building Handbook* recommends that no more than twenty-five people participate in a consensus building process, “to keep meetings productive and give everyone a chance to participate.”²³² Parties may choose to appoint multiple representatives for each interest category.²³³ However if twenty-five parties or more were to take part in mediation, the mediator would need to be trained in working with large groups. Otherwise, fewer participants would be more productive in a mediation context.

²³⁰ See *id.*

²³¹ *Id.*

²³² *Id.*

²³³ See *id.*, at 92–93.

Finally, parties must select representatives. Presumably, the petitioner will represent itself, as will the PSD and any party with individual interests. However, if there is a group of intervening neighbors with shared interests, for example, or multiple environmental NGOs with similar goals, they will need to select one party from among their number to represent the interests of the group in mediation. Representatives should be “knowledgeable about the issues at hand, able to work productively with others, supported by their constituency, interested in participating, and available for periodic meetings during the expected duration of the project.”²³⁴ *The Consensus Building Handbook* also says that “[i]t is usually desirable to invite people who have the same status within their respective organizations. If the president or other high-level decision maker of one organization has agreed to participate, discussions are generally more productive if that person’s counterpart from the other interest categories also participate.”²³⁵ This of course will be difficult, if not impossible, to do in PUC cases, given the composition of parties including businesses, state agencies, NGOs, and individuals, however if it is possible in some instances it may be helpful.

For PUC cases, all parties should agree to the type of participation utilized in mediation. Given stakeholders’ interests in participation in settlement discussions and concerns about transparency, there should be a presumption in favor of open participation, unless the number of parties invested in the issues under discussion is too large to conduct an effective conversation. If representative participation is used, it should be used with caution and planned carefully so that all interests are represented and the process remains transparent.

Observers

If any parties to the case are not actively participating in a mediation session—if parties agree to representative participation, for example, or if mediation is conducted on

²³⁴ *Id.*, at 93.

²³⁵ *Id.*

specific issues that only involve certain parties—those parties not participating should be permitted to observe the mediation. Allowing observers grants parties with an interest in the outcome access to the process without overwhelming the process with additional participants.²³⁶ This will keep the process transparent and eliminate the possibility of parties claiming decisions were reached behind closed doors.²³⁷ Observers should be expected to follow all guiding principals and ground rules established by the process, including the principal of mediation confidentiality.²³⁸ Ground rules may include provisions for when observers may speak during a mediation session.²³⁹

Observers may observe plenary mediation sessions, when all parties are negotiating in the same room, but observers should also be included in any other process a mediator chooses to employ. If the mediator chooses to use shuttle diplomacy, for example, parties could observe meetings between their representative and the mediator.

Other Optional Roles

Parties may wish to involve those filling other roles in the ADR process, such as a recorder or a resource or technical adviser.

Recorders are important in consensus building processes. “The recorder may be someone from the mediation team or a person from an agency or organization familiar with the subject matter and has been approved for this role by all the parties.”²⁴⁰ The role of the recorder is to record the meeting for all participants: “Recorders may capture key ideas on flip charts or take more detailed meeting ‘minutes’ on a computer.”²⁴¹ Parties should agree on how they wish notes to be taken in advance. “The more formal and complex the process,

²³⁶ *See id.*, at 95.

²³⁷ *See id.*

²³⁸ *See id.*, at 95–96.

²³⁹ *See id.*

²⁴⁰ *Id.*, at 95.

²⁴¹ *Id.*

the more detailed notes parties may want.”²⁴² Of course, it is possible to utilize multiple forms of note taking, but “[i]f both meeting minutes and group memory tools [flip charts, white boards, etc.] are to be used, separate individuals should be assigned to perform each task.”²⁴³

Parties may also wish to enlist a resource person or technical adviser for the mediation, particularly since technical and scientific issues are central to the discussion.²⁴⁴ Resource people and technical advisers are individuals “who possess in-depth knowledge of a topic relevant to the deliberation, [and] may or may not be affiliated with a party in the process, depending on how controversial the technical information is.”²⁴⁵ A technical advisor may be an expert parties worked with during joint fact-finding. For example, parties may want an agency scientist at the table, or a resource person knowledgeable about legal, economic, or scientific matters.²⁴⁶ All parties should agree on the identity of any resource people or technical advisers, and those individuals should be present at all mediation sessions.²⁴⁷ Resource people or technical advisers may be redundant in PUC cases, especially if parties have engaged in joint fact-finding, but the option should still be available to participants.

Conclusion

In summary, we recommend that the facilitator screening for the effectiveness of ADR be a member of the PUC staff other than the hearing officer. The facilitator assisting with the joint fact-finding processes during discovery should be this same staff member. Any mediation after discovery or organically elsewhere in the process should be conducted by a

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *See id.*

²⁴⁵ *Id.*

²⁴⁶ *See id.*

²⁴⁷ *See id.*

skilled outside mediator with expertise in utility regulation. The PUC should maintain a roster of mediators from which parties can choose.

Which parties participate in ADR processes should remain flexible and should be decided on a case-by-case basis. All parties could represent themselves, or if the number of parties is too unwieldy for effective problem solving and parties have shared interests, one party could represent multiple parties at the ADR table while the other parties observe the process. It would also be possible to mediate on specific issues that involve a limited number of parties, however all interested parties should be permitted to observe the mediation to preserve transparency. To further ensure transparency, no ADR should take place beyond early community outreach until intervenor status has been decided and all parties to the case have been identified. Finally, parties may wish to bring other roles, such as a recorder or a resource or technical adviser, into the ADR process to consult on technical or scientific details or legal matters.

Funding Mediation

Parties may incur additional costs in pursuing ADR, and especially in engaging in formal mediation and joint fact-finding. Various stakeholders were concerned that costs of ADR would: make the entire application process more expensive; discourage overall development; be thrust upon the party perceived as the “wealthiest” of the bunch; and/or be used as a tool to discourage dispute settlement.

While it must be granted that these concerns are valid, the ultimate aim of ADR and mediation is to make the entire process less costly. By resolving disputes earlier on, parties will save time and resources that would have been spent on attorneys, experts, and all that goes in to putting together a compelling contested case submission. Even though mediation should usually result in cost savings, there are bound to be some individual cases that are more expensive as a result of ADR. With that in mind, ADR could be:

- funded publicly, through taxes and budgetary allocation;
- covered by petitioners; or

- allocated amongst the parties.

Public Funding

Public funding of an ADR system assumes that the funds would come from the Vermont Legislature. Like in California and New York,²⁴⁸ and less populous states like Wisconsin,²⁴⁹ intervenors could receive Intervenor Funding. If the ADR system works well the resulting reduction of the PUC's expenses on full case litigation could mean that the PUC's current budget allotment, in conjunction with fees collected from utilities, would be sufficient to cover ADR expenses, providing intervenors with intervenor funding.

Reallocation of the PUC's budgetary resources would take time, though. The Legislature must then be willing to increase the resources available to the PUC (or any other government entity paying for mediation or other ADR), either through increasing budgets, or creating a special PUC ADR fund. According to many interviewees in leadership of agencies and government, outright funding action by the Vermont Legislature is highly unlikely, and should not be counted upon.

Petitioner Funding

Although we have not found any state which explicitly charges one side alone for mediation services, petitioners could be required to pay the cost of mediation. This could be accomplished through bill-back processes or through a blanket increase in application fees. While many past intervenors and their counsel have championed this option, petitioners

²⁴⁸ "The Intervenor Compensation Program," California PUC, <http://www.cpuc.ca.gov/icom/> [accessed Dec. 2, 2017]; "The Fund for Municipal and Local Parties: A Guide to Intervenor Funding Pursuant to Article 10 of the Public Service Law," New York DPS, [http://www3.dps.ny.gov/W/PSCWeb.nsf/96f0fec0b45a3c6485257688006a701a/6fd11ce8db088a2785257e200054a99b/\\$FILE/02420356.pdf/Guide%20to%20Intervenor%20Funding%202-14-13.pdf](http://www3.dps.ny.gov/W/PSCWeb.nsf/96f0fec0b45a3c6485257688006a701a/6fd11ce8db088a2785257e200054a99b/$FILE/02420356.pdf/Guide%20to%20Intervenor%20Funding%202-14-13.pdf) [accessed Dec. 2, 2017].

²⁴⁹ Wis. Stats. Ch. PSC 3, (2007), <https://psc.wi.gov/PublishingImages/Pages/Programs/IntervenorComp/PSC%20Chapter%203%20Intervenor%20Comp.pdf> [accessed Dec. 3, 2017].

were predictably opposed. Should petitioners pay the cost of mediation, high costs would not deter citizen intervenors from engaging in the dispute resolution process. At the same time, small merchant generators likely do not have the same resources as large public utilities—not all petitioners can afford the same level of economic burden. Burdening petitioners alone with additional expenses may also serve to discourage energy development overall, which may have been deemed to be in the public good, had the petition been brought in the first place. Finally, requiring one party alone to pay for mediation may result in concerns of mediator neutrality. Parties may sense that an external mediator would be unavoidably beholden to the party paying his or her fees.

Cost-Sharing

The parties may also split the cost of ADR. This does not mean that the cost would be directly proportionate to the number of parties involved. Rather, a calculation based on available resources could split the cost more fairly amongst parties. Such a cost-sharing calculation could be used not only to fund mediation but also to fund joint fact-finding efforts. As stressed by numerous stakeholders, especially those representing petitioners, the benefit of cost-sharing is that all parties then have “skin in the game.” While non-paying parties may be incentivized to drag out the mediation, in order to harm the opposing parties, requiring payment by each party would encourage good-faith engagement in the mediation. That said, past intervenors have stressed their inability to participate effectively because of the overwhelming cost of legal work and expert opinions. Foisting some cost of mediation upon intervenors may perpetuate the difficulty faced by those parties.

Overall Considerations

Ultimately, the PUC could count on mediation decreasing expenditure of Commission time and resources overall, so that the money saved in avoided litigation could be redirected to mediation. This assumption—that mediation saves time and money—is

resoundingly supported by a nation-wide U.S. Department of Justice study from 2016,²⁵⁰ showing:

- The success rate for voluntary ADR proceedings was around 75%.
- The success rate for court-ordered ADR proceedings was around 52%.
- Actual costs that were avoided (including, for example, discovery costs, trial exhibits, etc.) were \$70,610,263.
- 26,388 days of attorney and staff time were saved; and,
- 2,733 months of litigation time were saved.

Granted, the savings in PUC processes may vary from those recorded by the DOJ, and working toward overall decreased expenditure may take time. With that in mind, the Commission could try a variety of the aforementioned approaches to funding, and endeavor to determine which works best, until ADR begins to provide overall cost savings.

After ADR

If parties successfully reach an agreement after engaging in ADR, the PUC will have to approve the agreement and the proposed project. Similar to the process used by the California PUC, the Vermont PUC should base its approval on whether the agreement is legally sufficient and the project conforms to PUC standards and public policy. In short, the PUC should evaluate the modified project proposal and evidence as it would a project proposal in the current system, however it should do so in an expedited manner, as there are no more contested issues to be heard.

If parties are unable to reach an agreement with ADR, the process continues with the traditional technical hearing. Any issues not addressed in ADR will also need to progress to a technical hearing, as will any cases that were originally deemed to be inappropriate for ADR.

²⁵⁰ *Statistical summary: Use and benefits of alternative dispute resolution by the Department of Justice*, U.S. Department of Justice, (2016), <http://www.justice.gov/olp/adr/doj-statistics.htm> [accessed December 3, 2017].

Conclusions: Going Forward

Before these recommendations can be implemented, the PUC must make several decisions. First, the PUC must decide who will facilitate the screening meeting and joint fact-finding process, as well as who will serve as mediator during formal mediation. While we have made recommendations on the identity of facilitators and mediators, the PUC could make a different decision based on resources or preferences, though as discussed above the identity of mediators and facilitators will have consequences on the process. Second, the PUC needs to decide if ADR should be mandatory or voluntary, mandatory with the possibility of waiving it, or voluntary with the possibility that the PUC could require it. Finally, the PUC must decide how any additional costs of ADR will be borne.

If the PUC decides that PUC or PSD staff should be involved in ADR in any way, we recommend that these staff be trained in facilitation and/or mediation and active listening skills²⁵¹.

Once these decisions are reached, the PUC can establish a pilot program that will give stakeholders the chance to experience the benefits of these ADR processes as well as the opportunity to work out any issues with the process.

We have recommended a number of processes that are meant to work together, not individually, to improve public access to the PUC's processes and to meet as many stakeholder interests as possible. These processes allow stakeholders to collaboratively explore their underlying interests, discover scientific and technical criteria, generate creative options based on that criteria, and reach mutually beneficial agreements, all while

²⁵¹ See generally Douglas Stone, Bruce Patton & Sheila Heen, *Difficult Conversations: How to discuss What Matters Most* (2010) (outlining the process and benefits of active listening).

improving relationships and thus the tone of the process²⁵². If all aspects of this process are implemented into PUC cases, disputes should be resolved with each step, simplifying the process and narrowing the scope of the contested issues.

²⁵² See generally Roger Fisher, William Ury & Bruce Patton, *Getting to Yes: Negotiating Agreements Without Giving In* (2011) (outlining the key components of a negotiation as exploration of all parties' alternatives, underlying interests, creative options, and objective criteria, as well as communication between the parties, the parties' relationship with each other, and each party's ability to commit to the agreement).

Appendix 1: About Us—HNMCP

HNMCP, one of the eighteen in-house clinics at HLS,²⁵³ provides HLS students with the opportunity to get hands-on experience by working with clients from outside the law school for class credit. Founded in 2006, the clinic focuses specifically on engaging in projects involving conflict management and dispute systems design. All students involved in HNMCP have been trained in HLS's Negotiation Workshop,²⁵⁴ and are required to pursue further course work in dispute systems design.²⁵⁵ Two HLS students, working *pro bono*, spent the bulk of a semester researching and writing this report.

²⁵³ "In-House Clinics," Harvard Law School, <http://hls.harvard.edu/dept/clinical/clinics/in-house-clinics/> [accessed Dec. 2, 2017].

²⁵⁴ "Negotiation Workshop," HNMCP, <http://hnmcp.law.harvard.edu/negotiation-workshop/> [accessed Dec. 2, 2017].

²⁵⁵ "Negotiation & Mediation Clinical Seminar," HNMCP, <http://hnmcp.law.harvard.edu/negotiation-mediation-clinical-seminar/> [accessed Dec. 2, 2017].

Appendix 2: Best Practices Findings—Mediation in Other Jurisdictions

State / Jurisdiction	Body(ies)	ADR Program Mentioned Online?	Relevant Website Info
Alabama	<ul style="list-style-type: none"> Public Service Commission 	No.	n/a
Alaska	<ul style="list-style-type: none"> Department of Natural Resources Energy Authority Regulatory Commission of Alaska 	<ul style="list-style-type: none"> Before Regulatory Commission, per 3 AAC 48.121: “A person may request alternative dispute resolution by petition if no adjudicatory proceeding is open; or by motion in an existing adjudicatory proceeding. An initiating order in an adjudicatory proceeding will specify the date by which a motion for alternative dispute resolution must be filed.” The Commission must approve ADR, and “may assess participants a share of the costs of the ADR proceeding.” 	<ul style="list-style-type: none"> http://rca.alaska.gov/RCAWeb/Documents/StatutesRegs/AAC%20MAIN%20PAMPHLET%20REG%20201%20APRIL%202012.pdf
Arizona	<ul style="list-style-type: none"> Corporation Commission 	<ul style="list-style-type: none"> Mediation in consumer complaints. 	<ul style="list-style-type: none"> http://www.azcc.gov/Divisions/

		<p>Done by Consumer Services Section of the Corporation Commission.</p> <ul style="list-style-type: none"> • Mediation in interconnection agreements, under AZ Admin. Code Title 14, Ch. 2 R14-2-1501 (Article 15). 	<p>Administration/Annr/2015-2016/2016%20Annual%20Report%20.pdf</p> <ul style="list-style-type: none"> • http://apps.azsos.gov/public_services/Title_14/14-02.pdf
Arkansas	<ul style="list-style-type: none"> • Public Service Commission 	No.	n/a
California	<ul style="list-style-type: none"> • Energy Commission • Public Utilities Commission • Office of Ratepayer Advocates 	<ul style="list-style-type: none"> • See description of PUC's ADR system in "Recommendations" above. • Also note: Public Adviser's Office at the California Energy Commission was recently established "to ensure that full and adequate participation by all interested groups and the public at large is secured in Energy Commission proceedings." 	<ul style="list-style-type: none"> • http://www.cpuc.ca.gov/adr/ • http://www.energy.ca.gov/public_adviser/.
Colorado	<ul style="list-style-type: none"> • Denver Community Planning • Department of Energy • Energy Office • Public Utilities Commission 	No.	n/a
Connecticut	<ul style="list-style-type: none"> • Siting Council 	No.	n/a
Delaware	<ul style="list-style-type: none"> • Division of the Public Advocate 	No.	n/a

	<ul style="list-style-type: none"> • Public Service Commission 		
Florida	<ul style="list-style-type: none"> • Department of Environmental Protection • Office of Public Counsel • Public Service Commission 	No.	n/a
Georgia	<ul style="list-style-type: none"> • Public Service Commission 	No.	n/a
Hawaii	<ul style="list-style-type: none"> • Land Use Commission • Public Utilities Commission 	No.	n/a
Idaho	<ul style="list-style-type: none"> • Boise Planning & Zoning • Public Utilities Commission 	No.	n/a
Illinois	<ul style="list-style-type: none"> • Commerce Commission • Environmental Council 	No.	n/a
Indiana	<ul style="list-style-type: none"> • Utility Regulatory Commission 	<ul style="list-style-type: none"> • In 170 IAC Art. 1, Rule 4, Sec. 1: Sec. 1, allows for “‘mediation’... an informal and nonadversarial process in which a neutral third person, called a mediator, acts to encourage and to assist in the resolution of a dispute between two (2) or more parties with the objective of helping the disputing parties reach a mutually acceptable agreement between or among themselves on all or any part of the 	<ul style="list-style-type: none"> • http://www.in.gov/iurc/files/prac-proc_rules.pdf

		issues in dispute.” Does not provide any more information online.	
Iowa	<ul style="list-style-type: none"> • Utilities Board 	No.	n/a
Kansas	<ul style="list-style-type: none"> • Department of Health and Environment • Corporation Commission 	No.	n/a
Kentucky	<ul style="list-style-type: none"> • Public Service Commission • State Board on Electric Generation & Transmission 	No.	n/a
Louisiana	<ul style="list-style-type: none"> • Department of Environmental Quality • Energy and Power Authority 	No.	n/a
Maine	<ul style="list-style-type: none"> • Department of Environmental Protection 	No.	n/a
Maryland	<ul style="list-style-type: none"> • Public Service Commission 	<ul style="list-style-type: none"> • Seems as if Commissioners can ask parties if they would both consent to mediation with Public Utility Law Judge Division. This is not explained well online, but is evidenced in documentation provided online. 	<ul style="list-style-type: none"> • Documents, for download, evidencing use of mediation can be found here: http://www.psc.state.md.us/search-results/?keyword=mediation.
Massachusetts	<ul style="list-style-type: none"> • Department of Public Utilities • Energy Facilities Siting Board 	<ul style="list-style-type: none"> • While commentators have highlighted the “very active public participation” before the EFSB, there 	<ul style="list-style-type: none"> • See p. 10, at https://www.nh.gov/osi/energy/programs/documents/sb99other_

		is no description of an ADR program online.	states_process.pdf.
Michigan	<ul style="list-style-type: none"> Public Service Commission 	<ul style="list-style-type: none"> The PSC allows for mediation and arbitration for interconnection agreements, only. 	<ul style="list-style-type: none"> http://www.michigan.gov/documents/mpsc/u-16250_08-30-2010_561921_7.pdf
Minnesota	<ul style="list-style-type: none"> Commerce Department Public Utilities Commission 	<ul style="list-style-type: none"> Seems like Public Hearings and Contested Case Hearings are presided over by ALJs, supplied by an ALJ body separate from Commerce Department (in charge of siting) and PUC. The Office of Administrative Hearings (ALJ repository) allows for parties to request mediation. 	<ul style="list-style-type: none"> https://mn.gov/commerce/energyfacilities/#tabs=5 https://mn.gov/oah/self-help/mediation.
Mississippi	<ul style="list-style-type: none"> Public Service Commission 	No.	n/a
Missouri	<ul style="list-style-type: none"> Public Service Commission 	<ul style="list-style-type: none"> Statute, 4 CSR 240-2.125 (Procedures for Alternative Dispute Resolution), “establishes procedures which will allow parties to utilize alternative dispute resolution methods in order to resolve issues or the entire matter in dispute.” Provides for settlement negotiations and/or mediation. Requires a wall 	<ul style="list-style-type: none"> https://www.sos.mo.gov/cmsimages/adrules/csr/current/4csr/4c240-2.pdf

		between mediator and case officers—no communication between them about case matter (Section (2)(D)).	
Montana	<ul style="list-style-type: none"> • Pubic Service Commission 	<ul style="list-style-type: none"> • Per Mont. Admin. Rule: 38.5.4009, parties in telecommunication interconnection disputes may engage in mediation. • Mediators could be third parties found by parties, or Commission staff. Can also use co-mediation (Commission staff and third party). 	<ul style="list-style-type: none"> • http://www.mtrules.org/gateway/RuleNo.asp?RN=38%2E5%2E4009.
Nebraska	<ul style="list-style-type: none"> • Energy Office • Power Review Board 	No.	n/a
Nevada	<ul style="list-style-type: none"> • Governor's Office of Energy • Public Utilities Commission 	No.	n/a
New Hampshire	<ul style="list-style-type: none"> • Site Evaluation Committee 	<ul style="list-style-type: none"> • While it seems that NH is working towards ADR, no clear indication was provided online. 	n/a
New Jersey	<ul style="list-style-type: none"> • Board of Mediation • Board of Public Utilities • Department of Environmental Protection 	<ul style="list-style-type: none"> • "The Department of Environmental Protection (DEP) has established the Office of Dispute Resolution to provide a forum other than the administrative and trial courts for 	<ul style="list-style-type: none"> • http://www.state.nj.us/dep/odr/.

		<p>resolution of disagreements between the regulated community and the DEP. This forum aims to serve a dual purpose: not only to reduce lengthy legal proceedings that can be costly for all involved, but also to establish more meaningful and effective lines of communication between environmental regulators and the regulated community.”</p> <ul style="list-style-type: none"> • It seems that participants are the Agency and the regulated entities, and that the public / intervenors may not be involved in the process. 	
New Mexico	• Public Regulation Commission	No.	n/a
New York	• Siting Board	<ul style="list-style-type: none"> • While unclear if New York provides for ADR, it does support citizen involvement through: intervenor funding; Public Involvement Plans; and a Public Information Coordinator. 	<ul style="list-style-type: none"> • Intervenor Funding: http://www3.dps.ny.gov/W/PS/CWeb.nsf/96f0fec0b45a3c6485257688006a701a/6fd11ce8db088a2785257e200054a99b/\$FILE/02420356.pdf/Guide%20to%20Intervenor%20Funding%202-14-13.pdf. • Public Involvement Plan: http://www3.dps.ny.gov/W/PS

			<p>CWeb.nsf/96f0fec0b45a3c6485257688006a701a/6fd11ce8db088a2785257e200054a99b/\$FILE/PIP%20Guidance%20Document%202.8.13.pdf.</p> <p>• Public Info Coordinator: http://www3.dps.ny.gov/W/PS-CWeb.nsf/All/E3DBE928E31571D385257C5A00521154?OpenDocument.</p>
North Carolina	<ul style="list-style-type: none"> • Department of Environmental Quality • Utilities Commission 	No.	n/a
North Dakota	<ul style="list-style-type: none"> • Public Service Commission 	<ul style="list-style-type: none"> • Statute establishing PSC makes broad allowances for ADR / mediation, but no specifics are given online. 	<ul style="list-style-type: none"> • http://www.legis.nd.gov/cencod/e/t28c32.pdf
Ohio	<ul style="list-style-type: none"> • Public Service Board 	No.	n/a
Oklahoma	<ul style="list-style-type: none"> • Corporation Commission 	No.	n/a
Oregon	<ul style="list-style-type: none"> • Public Utilities Commission 	No.	n/a
Pennsylvania	<ul style="list-style-type: none"> • Public Utilities Commission 	<ul style="list-style-type: none"> • ALJs at the PUC can resolve disputes through mediation, but the PUC does not handle siting disputes. 	<ul style="list-style-type: none"> • http://www.puc.state.pa.us/about_puc/mediation.aspx.
Rhode Island	<ul style="list-style-type: none"> • Energy Facility Siting Board 	No.	n/a

	<ul style="list-style-type: none"> • Public Utilities Commission 		
South Carolina	<ul style="list-style-type: none"> • Office of Regulatory Staff • Public Service Commission 	<ul style="list-style-type: none"> • Mediation are free of charge and offered by the Office of Regulatory Staff (ORS) and are available to any party involved in a dispute within the jurisdiction of the SC Public Service Commission. ORS representatives will act as mediators. • Mediation may take place in a variety of contexts. Mediation may be conducted over the phone, in a neutral location of the parties' and mediator's choosing, or at the offices of the ORS 	<ul style="list-style-type: none"> • http://www.regulatorystaff.sc.gov/consumerservices/Pages/Mediation.aspx.
South Dakota	<ul style="list-style-type: none"> • Public Utilities Commission 	No.	n/a
Tennessee	<ul style="list-style-type: none"> • Valley Authority 	No.	n/a
Texas	<ul style="list-style-type: none"> • Commission on Environmental Quality • Public Utilities Commission • State Office of Administrative Hearings 	<ul style="list-style-type: none"> • PUC allowed for mediation in telecom interconnection disputes, and "certain contract disputes." • Also, the TCEQ's Alternative Dispute Resolution (ADR) program offers mediators—trained, neutral facilitators—to help settle disputes between parties to TCEQ matters. 	<ul style="list-style-type: none"> • http://www.puc.texas.gov/agency/rulesnlaws/interconnect/21.93/21.93.pdf • https://www.puc.texas.gov/agency/rulesnlaws/adminrules/27.65/27.65.pdf • https://www.tceq.texas.gov/agen

		The mediators help by: keeping the parties focused in their discussions; assisting the parties in communicating their interests to one another; helping the parties explore settlement options; and assisting in drafting settlement documents.” This helps avoid “complex, costly, and time consuming” hearings at State Office of Administrative Hearings (SOAH).	cy/dispute_res.
Utah	<ul style="list-style-type: none"> • Department of Administrative Services • Public Service Commission 	No.	n/a
Virginia	<ul style="list-style-type: none"> • Public Utilities Commission • State Corporation Commission, Division of Energy Regulation 	<ul style="list-style-type: none"> • Division of Energy Regulation “may mediate or mediate or resolve certain controversies between public service companies and mediate controversies between such companies and customers. 	<ul style="list-style-type: none"> • https://law.lis.virginia.gov/admincode/title20/agency5/preface/
Washington	<ul style="list-style-type: none"> • Energy Facility Site Evaluation Council 	<ul style="list-style-type: none"> • Offers some mediation in siting disputes, but not well explained 	<ul style="list-style-type: none"> • http://www.efsec.wa.gov/standards/krogh10-02/Mediation--

		online.	Exhibit%20C(12).pdf.
Washington, D.C.	<ul style="list-style-type: none"> • Public Service Commission 	No.	n/a
West Virginia	<ul style="list-style-type: none"> • Office of Administrative Hearings • Public Service Commission 	No.	n/a
Wisconsin	<ul style="list-style-type: none"> • Public Service Commission 	<ul style="list-style-type: none"> • While existence of ADR offerings are unclear, PSC does offer Intervenor Funding. 	<ul style="list-style-type: none"> • https://psc.wi.gov/PublishingImages/Pages/Programs/IntervenorComp/PSC%20Chapter%203%20Intervenor%20Comp.pdf.
Wyoming	<ul style="list-style-type: none"> • Public Service Commission 	No.	n/a
Federal Bodies	<ul style="list-style-type: none"> • FERC Dispute Resolution Service • Department of Energy 	<ul style="list-style-type: none"> • FERC offers ADR with the Dispute Resolution Service (DRS), a professional team that promotes timely and high quality resolution of disputes through consensual decision-making processes such as mediation. The DRS Specialists are highly trained in mediation, negotiation, and facilitation. They also provide training in dispute resolution skills. 	<ul style="list-style-type: none"> • https://www.ferc.gov/about/offices/oaljdr/drs.asp.
Alberta, Canada	<ul style="list-style-type: none"> • Energy Regulator 	<ul style="list-style-type: none"> • The ADR program was developed in response to the desire of AER stakeholders (the public, companies, 	<ul style="list-style-type: none"> • http://www.aer.ca/applications-and-notice/alternate-dispute-resolution.

		government agencies, First Nations, Métis, and special interest groups) to be more directly involved and have more control in resolving energy-related disputes. Most typically, ADR is used to resolve public-to-company and company-to-company disputes; it is a company's responsibility to inform potentially impacted stakeholders of the nature of proposed energy developments.	<ul style="list-style-type: none"> • http://www.aer.ca/documents/manuals/Manual004.pdf. • http://www.aer.ca/about-aer/enerfaqs/enerfaqs-adr. • http://www.aer.ca/documents/reports/ADRAnnualReport-2015.pdf.
British Columbia, Canada	<ul style="list-style-type: none"> • Dispute Resolution Office • Energy BC • Oil and Gas Commission • Surface Rights Board • Utilities Commission 	<ul style="list-style-type: none"> • The Mediation and Arbitration Board of the Dispute Resolution Office and the Oil and Gas Commission partner to encourage parallel dispute resolution processes. 	<ul style="list-style-type: none"> • https://www.bcogc.ca/node/5649/download.
Ontario, Canada	<ul style="list-style-type: none"> • Energy Board • Ministry of Energy 	No.	n/a
Quebec, Canada	<ul style="list-style-type: none"> • Ministry of Energy and Natural Resources 	No.	n/a
Saskatchewan, Canada	<ul style="list-style-type: none"> • Ministry of Environment • Public Service Commission 	No.	n/a

Appendix 3: Interview Protocols

Oral Interview Protocol:

This is the general template we used to ask questions of interviewees. These questions are tailored for government employees (PUC staff and commissioners, PSD staff and commissioners, and legislatures). We asked the same questions of different stakeholder groups but changed the wording to accommodate their varying affiliations. As we wanted interviews to flow naturally, we did not always ask all of these questions of stakeholders.

- **General Intro**
 - Would you be able to tell us about the work that you do, generally speaking? What kind of matters or issues do you deal with, more precisely? How long have you been working in government or public service?
 - Could you tell us about your experience with the Commission? How did you first get involved with matters at the Commission?
- **Current System**
 - In your opinion what part of the current disputed cases system is working well? What is not working well? Why?
 - *For those who are repeat players:* In your experiences at the Commission with different kinds of cases—siting, net metering, rates—what are some of the similarities and differences across the various cases?
 - *If repeat players:* Are the procedural problems facing public access the same across the different case processes? Are the aspects of the process, especially regarding public participation and access, that are working the same across the different case processes?
 - *If repeat players:* Could you tell us about the processes that are distinct to particular cases, in your experience? Is something working well for one type of case and not for others?

- How do you feel public comments are currently being assessed and implemented in the contested cases? Do you have any examples of how you think they are being used to inform decision-making and adjudication?
 - In what areas are you seeing parties most struggling with the case proceedings? Why do you think that parties are struggling with this aspect of the process?
 - In the past, how have public parties—such as *pro se* individuals, municipalities, or regional planning bodies—successfully accessed and utilized the dispute system? Do you think there are some common traits or approaches they’ve used?
 - What do you think the public’s current perception of public intervention in the Commission’s contested case processes is? What do you think this position is based upon? Do you think it can be improved upon? How?
- **Questions Targeted at Working Group Participants**
 - How were the public comments utilized in forming the recommendations of the Act 174 Working Group?
 - What other factors guided the formation of the Group’s recommendations?
- **Comparative Structures / Inspirations for an ADR Approach**
 - What are the benefits you see in automatic access for municipal governing and regional planning parties in PUC cases processes? What are some challenges that may stem from this statutorily increased public access?
 - What are some of the benefits for the PUC itself that you see in increased access for private individuals in PUC case processes? What are some of the benefits for outcomes as a whole? What are some existing barriers to increased access to private individuals?
 - If there is increased public access, what do you think the benefits will be? What do you think the challenges may be?
 - When you think about using ADR to resolve disputed matters at the PUC, what comes to mind? What concerns do you have regarding the use of ADR?
 - How do you think ADR can be incorporated into the existing process?
 - Do you think that ADR mechanisms might be able to replace some of the more traditional, legal structures currently? If so, how?
 - Do you have any experiences with Act 250 processes? If yes, what about the Act 250 process may work well if integrated into the Commission’s processes? Why?
 - In an ideal world, what would be the best system that the Commission could adopt to ensure public access and participation? Are there certain kinds of

ADR processes that you think would be best suited to use by the PUC in contested cases?

- Do you have any thoughts about how costs, or other resources, would be borne by the PUC or other parties?

- **Closing questions**

- Is there anything we haven't asked about that you think we should know?
- Can you recommend any other people that you think we should speak with?

Written interview protocol

Questions posed to stakeholders in email interviews:

1. Please briefly describe your experience(s) with the PUC?
2. In your opinion, what is working well in the PUC processes?
3. In your opinion, what is not working well in the PUC processes?
4. In your opinion, what part of the process is most challenging for intervenors?
5. What would be necessary for an intervenor to successfully navigate the process and feel the decision was reached fairly, regardless of outcome?
6. Do you see a place for an alternate dispute resolution system (such as mediation, negotiation, joint fact finding, early community outreach, etc.) in the current PUC process?
7. What benefits do you see yourself or your clients gaining from an alternate dispute resolution system?
8. What concerns do you have about alternate dispute resolution in the current PUC process?
9. Where in the current PUC process would it be best to have ADR?
10. How do you feel ADR should be funded?
11. Anything else you think we should know that we haven't touched on?

Appendix 4:

Comprehensive Interview Findings Chart

Description	Legend – Use of Symbol in “Stakeholder” Columns
The table below is a compilation of some of the most relevant statements made by of interviewed stakeholders. This table is not exhaustive, but meant to represent common themes that were highlighted throughout the interview process.	<p>✓ Stakeholder interviewed made, or substantially agrees with, statement.</p> <p>One symbol represents a statement by one interviewee.</p>

Theme	Statement	Stakeholder								
		PUC	State Gov.	Utility	Merchant Generator	Petitioner Counsel	RPC	Town	Citizen Intervenor	Intervenor Counsel
Inclusion	“It is encouraging that the PUC rarely denies requests for intervenor status.”								✓	
	“The process allows			✓						

	all perspectives to be heard.”									
	“Intervenors in PUC cases do not feel heard.”	✓					✓✓	✓✓	✓✓✓✓	✓
	“If a proposed project affects a large geographic area, public participation is logistically difficult.”	✓								
	“People do not attend public hearings because they are inconvenient and their comments are not included in the evidentiary record anyway.”		✓						✓	
	“Regional planning commissions have been excluded from cases to which they should have been statutory parties.”						✓			

	<p>“Intervenors are upset because they can have limited standing. For example, the PUC won’t grant intervenor status based on water or wildlife issues because that is the prevue of the Agency of Natural Resources, however many citizens may have expertise in these issues, even if they do not have specific credentials.”</p>								✓	
	<p>“Parties cannot proceed pro se before the supreme court, so intervenors may not be able to appeal or defend against an</p>								✓	

	appeal of the PUC's decision."									
	"There is a lack of clarity surrounding site visits, and there have been instances where members of the public have been denied access to a site by the landowner at a site visit."								✓✓✓	✓
	"It is problematic that comments made at site visits and public hearings are not included in the evidentiary record and that, until recently, there has been no response to public comments."								✓✓✓✓✓ ✓	
	"Citizen intervenors want their "day in court," but the	✓				✓				

	current rules do not allow for oral testimony, so intervenors feel they are not given the opportunity to say what they want to say.”									
	“It is a problem that the landowner who leased property to the developer is not involved in the siting process.”								✓	✓
	“Petitioners will work to comply with the regional plan but will often ignore the municipal plan.”							✓		
	“ADR needs to allow all parties to feel they were heard and the decision was reached fairly, regardless of	✓							✓✓	✓

	outcome.”									
	“Regardless of the type of ADR employed, all parties with a legitimate interest in the issue being discussed must be at the table.”			✓			✓✓		✓✓✓✓	✓
	“Pro se intervenors’ filings can be difficult to understand.”	✓								
	“ADR should not take place until intervenor status has been granted and all parties to the case have been identified.”					✓				✓
Theme	Statement	Stakeholder								
		PUC	State Gov.	Utility	Merchant Generator	Petitioner Counsel	RPC	Town	Citizen Intervenor	Intervenor Counsel
Education	“Generally citizens do not have time to								✓✓✓✓✓	✓✓

& Inclusion	become experts on either the substance of the case or the process of the PUC.”								✓✓	
	“Without knowledge of the substance or familiarity with the process going into the case, there is no way to catch up.”								✓✓	
	“Repeat players, the so-called “frequent flyers” of the PUC process, are more successful than those unfamiliar with the process.”		✓	✓		✓✓	✓		✓✓✓	✓
	“Intervenors unfamiliar with the process have no idea how disadvantaged they are.”						✓		✓✓✓	
	“I support increased community outreach	✓✓		✓✓	✓		✓✓		✓✓✓✓	✓

	by the petitioners prior to filing with the PUC.”									
	“Early community outreach and problem-solving to mitigate concerns about the project by petitioners would need to take place between petitioners sending advance notice to neighbors and filing with the PUC.”	✓		✓	✓				✓✓✓✓✓	
	“A pilot project should be established to test any ADR system and make adjustments before the system is fully implemented.”		✓		✓				✓	
	“Implementation of any ADR system	✓								

	should be accompanied by a training on ADR mechanisms for all stakeholders.”									
	“A community-based stakeholder process would need to take place “early in the game.”								✓	
Theme	Statement	Stakeholder								
		PUC	State Gov.	Utility	Merchant Generator	Petitioner Counsel	RPC	Town	Citizen Intervenor	Intervenor Counsel
Equality	“Because petitioners can influence legislation and pay close attention to happenings at the PUC, petitioners have significant advantages over intervenors. Petitioners are also									✓

	advantaged because of their familiarity with the process.”									
	“There is a huge imbalance of power in PUC proceedings.”								✓✓✓✓✓	✓✓
	“ADR with such a severe power imbalance as present in PUC proceedings will not be effective.”								✓✓✓	✓✓
	“For ADR to be effective, all parties need to have the power to say no, “to draw a line in the sand and defend it.””						✓		✓✓✓	✓
	“There are inequities in those using the services of the PUC. Larger utilities pay for the services through a gross receipts tax, while	✓✓								

	smaller developers do not.”									
	“ADR should take place after discovery, which would allow all the information to be on the table.”	✓		✓✓		✓✓	✓			✓✓
	“Conducting ADR after at least some discovery could remedy the imbalance of power stakeholders are concerned about.”	✓				✓✓				
	“A highly skilled mediator may be able to remedy the power imbalance parties are concerned about.”		✓							
	“While a petitioner <i>could</i> pay to equalize the playing field, it seems counterintuitive for a		✓							

	petitioner to pay for someone else to oppose them.”									
Theme	Statement	Stakeholder								
		PUC	State Gov.	Utility	Merchant Generator	Petitioner Counsel	RPC	Town	Citizen Intervenor	Intervenor Counsel
Improving Tone & Communication	“ADR could be effective in the PUC processes. In general, stakeholders feel ADR would help facilitate communication between the parties and narrow the issues under discussion.”	✓✓✓ ✓	✓✓	✓✓	✓✓✓	✓✓✓✓✓	✓✓✓✓	✓✓	✓✓✓✓✓ ✓✓✓✓✓ ✓	✓✓
	“The sooner ADR occurs in the process, the better.”	✓✓✓				✓✓	✓✓✓		✓✓✓	✓✓
	“ADR may not be effective in cases where the parties share little common ground and/or when intervenors opposing the project simply do	✓✓	✓	✓✓	✓	✓✓			✓✓	✓

	not want the project developed, rather than opposing the project because of concerns that could be mitigated.”									
	“The PUC is responsive and actively attempting to address criticism that it isn’t friendly to public participation.”	✓	✓			✓			✓✓✓✓	✓
	“The PUC is welcoming to, patient with, and understanding of pro se intervenors.”	✓✓				✓	✓✓		✓✓	
	“The process is conducted like a highly contested case from start to finish, even when there may be areas of common ground.	✓					✓	✓	✓	
	“Intervenors generally do not feel comfortable talking with petitioners.”	✓								

	“Because the public is struggling with the process, they feel like the “big bad utility,” which is not good.”			✓						
	“The idea of parties jointly selecting experts is problematic, as most experts in Vermont have built their careers as supporting one side or the other, and so it will be difficult for parties to find a neutral expert they can agree on.”			✓						
	“A community-based stakeholder process should be required for larger siting cases.”								✓✓	
	“For smaller siting cases, there should	✓							✓	

	simply be opportunity for the parties to sit down and talk.”									
	“The PUC may not understand the constraints weather place on petitioners—limited windows to conduct environmental research and to physically build the project.”					✓				
	“While ADR need not be mandatory for every case, the PUC should have the power to require parties engage in ADR when appropriate.”								✓	
	“There should be a screening process which would determine when ADR would be effective, perhaps a	✓								

	less formal, facilitated conversation that could elevate to formal mediation if appropriate.”									
Theme	Statement	Stakeholder								
		PUC	State Gov.	Utility	Merchant Generator	Petitioner Counsel	RPC	Town	Citizen Intervenor	Intervenor Counsel
Decreasing costs, time, complexity	To participate effectively in a PUC case, intervenors must hire experts or be experts, and/or hire attorneys.		✓			✓			✓✓✓✓	✓✓
	“Because attorneys and experts need to be hired, the process is overly expensive.”				✓✓	✓✓		✓	✓✓✓✓✓ ✓	✓✓
	“The timeline of a case is appropriately efficient, in fact more efficient than courts.”	✓✓	✓	✓		✓✓			✓	✓✓

	“Because of limited resources, intervenors are not financially equipped to be a match for the petitioners in the process.”	✓✓				✓			✓✓✓✓	✓✓
	“Timeline can be too tight, especially for smaller developers with limited resources.”				✓✓	✓✓				
	“Because of the influx of renewable energy projects, the PUC is not operating as efficiently as it should be.”	✓								
	“The PUC’s processes are “not terribly friendly” to those with limited resources.”	✓✓	✓						✓	✓
	“It is concerning that ADR could lengthen	✓			✓✓	✓✓				

	the process and increase expenses.”									
	“While it is important that all interested parties be given a seat at the ADR table, the more parties at the table, the more complex, time consuming, and expensive even the ADR process will become, and determining which parties have a legitimate interest such that they should be at the table will be challenging.”	✓				✓			✓	
Theme	Statement	Stakeholder								
		PUC	State Gov.	Utility	Merchant Generator	Petitioner Counsel	RPC	Town	Citizen Intervenor	Intervenor Counsel

Genuine Partici- pation	“The cost of ADR should be divided among the parties. The costs would not necessarily have to be split evenly among the parties, but these stakeholders feel if all parties contribute significantly to the process, each party will be invested in the process as much as possible, and risks of parties using ADR without true desire to resolve the issues would be minimized.”	✓✓			✓✓✓	✓✓				
	“The petitioner should pay for ADR from the CPG application fee.”								✓✓✓✓✓ ✓	✓✓
	“Intervenors opposed to the project may use ADR as a delay					✓				

	tactic, even if they have no intent of settling the case.”									
Trans- parency	“The PUC is described as a black box: information goes in and a decision comes out, but no one knows how that decision was made.”								✓✓✓	
	“The increase of memoranda of understanding to settle issues of a case is upsetting. At best, stakeholders are upset that the settlement process is off-the-record. At worst, stakeholders view these settlements as behind-closed-doors								✓✓✓✓✓	✓✓

	deal-cutting that excludes intervenors, whether citizen, town, or regional planning commission.”									
	“ADR, particularly mediation or unsupervised negotiation, emphasizes confidentiality, and so the process would not be included in the evidentiary record. This raises similar concerns about transparency that stakeholders are already raising about the MOU settlement process.”	✓✓✓	✓✓							
Theme	Statement	Stakeholder								

		PUC	State Gov.	Utility	Merchant Generator	Petitioner Counsel	RPC	Town	Citizen Intervenor	Intervenor Counsel
Rigor v. Access	“The process on the whole is opaque, daunting, and completely overwhelming for citizen intervenors.”	✓✓				✓✓			✓✓✓✓✓ ✓✓✓✓✓	✓✓
	“Discovery seems to be particularly challenging for intervenors.”	✓		✓					✓✓✓✓✓ ✓	
	“The introduction of ePUC, has made things easier and cheaper for intervenors to file information, stay updated on cases, and conduct research remotely.”		✓	✓		✓✓	✓		✓✓✓	✓✓
	“The ‘Citizens’	✓							✓✓✓	✓✓

	Guide to the Vermont Public Service Board's Section 248 Process" is too confusing to give potential intervenors a sense of how the process works."									
	"There can be a disconnect between the technical rigor the PUC applies and the concerns intervenors want to bring to the table, which intervenors want to be given the same weight as technical evidence and many of which, such as aesthetic concerns, are attached to strong emotions."	✓		✓		✓				

	“ADR should be less formal than the current process so that members of the public aren’t struggling so much with the process.”	✓					✓			
Theme	Statement	Stakeholder								
		PUC	State Gov.	Utility	Merchant Generator	Petitioner Counsel	RPC	Town	Citizen Intervenor	Intervenor Counsel
Consistency	“Since all cases are different, any ADR process must be flexible to accommodate the type of case and the needs of the party.”	✓✓				✓				✓
	“ADR should not be so formal and rigid as to have a set time for every case.”	✓		✓		✓	✓		✓	✓
	Timing of ADR should be flexible and	✓		✓		✓	✓		✓	✓

	organic and handled on a case-by-case basis, perhaps with multiple specific points where ADR could take place but also with the ability to step back from the formal PUC processes at any point and engage in ADR should it be appropriate.									
Guidance v. Neutrality / Trust	“A facilitator could be helpful for siting cases, but also said that a facilitator was likely unnecessary for ratemaking cases.”			✓✓						
	“There is a perception that the deck is stacked against citizens who intervene, and there is no way for a	✓✓							✓✓✓✓✓	

	member of the public to successfully object to a project.”									
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Appendix 5: Additional Ideas from Stakeholders & Other Jurisdictions

Stakeholders

Several stakeholders proposed additional recommendations that, while unrelated to ADR, could nevertheless improve public access to PUC processes.

One representative of a utility and one citizen intervenor expressed that the public needs more information about a project before the public hearing, both to inform any comments citizens wish to make at the public hearing and to assist in the choice to become a party to the case. The citizen intervenor recommended that any additional information to the public be neutral about the project, because as of right now there is no unbiased information on a project prior to filing. The utility representative believed the petitioner should put on an educational program and/or distribute additional information, as the petitioner is the expert on the project at this stage of the process.

Similarly, six stakeholders (four citizen intervenors and two attorneys) said that citizens need more user-friendly information about the process itself, so as to know what to expect throughout the process. These stakeholders recommend updating the current “Citizens’ Guide to the Vermont Public Service Board’s Section 248 Process,” which stakeholders agree is out-of-date, unclear, and overall unhelpful.

Addressing the concerns about lack of access to sites at site visits, a few stakeholders expressed a desire for definitive public access to the site during site visits.

One attorney, one representative of an NGO, and one citizen intervenor recommended that the PUC appoint either an attorney or an advocate to represent members of the public before the Commission.

Similarly, four stakeholders from different groups recommend an independent ombudsman or attorney be placed in either the PUC or PSD to advise members of the

public, though there are significant concerns about keeping such an advisor independent, and stakeholders agree this would not be a sufficient solution to the present problems.

Two citizen intervenors recommended the PUC be given enforcement ability beyond a fine a petitioner “will just build into the cost of the project.”

Several stakeholders expressed the desire for ability to participate in PUC proceedings remotely to alleviate the burdens of traveling to Montpelier.

Two representatives of both a regional planning commission and towns believe that regional planning commissions and towns should be statutory parties to siting cases. On the other hand, another representative of a regional planning commission said that regional planning commissions and towns should not be statutory parties.

One representative of a utility recommended there be a statutory timeline for siting cases, as there is for ratemaking cases.

Another representative of a regional planning commission recommended a detailed training be held for PUC commissioners and staff on the role of regional planning commissions and towns in the siting process.

Echoing concerns that not all projects were for the public good, two citizen intervenors emphasized that proposed projects must “truly benefit” the public of Vermont to be granted CPGs.

Other Jurisdictions

A few of the potential problems highlighted by stakeholders—while not directly linked to an ADR system—have been addressed in other jurisdictions, and should be outlined briefly here. Citizen intervenors have struggled with the cost of legal counsel, and the difficulty of intervening *pro se*. New York and California have addressed similar

concerns, by providing citizen intervenors, not only with intervenor funding,²⁵⁶ but with dedicated, citizen-facing attorneys. New York has deployed a Public Information Coordinator,²⁵⁷ while California has established the Public Adviser's Office.²⁵⁸ Both the Public Information Coordinator and the Public Adviser have been able to give legal assistance and advice to intervenors. Should the PUC and/or PSD be able to procure the necessary funds, or be able to allocate work to an existing employee who may be kept independent of cases in which he or she is advising citizen intervenors, they may consider providing public intervenors with an information coordinator, or public adviser.

²⁵⁶ "The Intervenor Compensation Program," California PUC, <http://www.cpuc.ca.gov/icom/> [accessed Dec. 2, 2017]; "The Fund for Municipal and Local Parties: A Guide to Intervenor Funding Pursuant to Article 10 of the Public Service Law," New York DPS, [http://www3.dps.ny.gov/W/PSCWeb.nsf/96f0fec0b45a3c6485257688006a701a/6fd11ce8db088a2785257e200054a99b/\\$FILE/02420356.pdf/Guide%20to%20Intervenor%20Funding%202-14-13.pdf](http://www3.dps.ny.gov/W/PSCWeb.nsf/96f0fec0b45a3c6485257688006a701a/6fd11ce8db088a2785257e200054a99b/$FILE/02420356.pdf/Guide%20to%20Intervenor%20Funding%202-14-13.pdf) [accessed Dec. 2, 2017].

²⁵⁷ "AC Transmission – Public Information Coordinator," New York DPS, <http://www3.dps.ny.gov/W/PSCWeb.nsf/All/E3DBE928E31571D385257C5A00521154?OpenDocument> [accessed Dec. 2, 2017].

²⁵⁸ "Public Adviser's Office," California Energy Commission, http://www.energy.ca.gov/public_adviser/ [accessed Dec. 2, 2017].

Appendix 6: Interviewees' Views on Act 250

Several stakeholders discussed Act 250 and the applicability of Act 250 processes to the PUC process.

A member of the PUC staff said that people like Act 250 because it is easier for the public to get involved in the process and to feel heard. Another member of the PUC said there are places within the Act 250 processes for parties to “sit down and talk” and the PUC should have such opportunities in its processes as well.

Two representatives of a regional planning commission and towns suggested the PUC should use the Act 250 criteria in its decision-making, and one representative of an NGO and one senator suggested the PUC utilize the localized infrastructure of Act 250. In the regional planning commission representative’s opinion the Act 250 criteria is more “hard and fast” than the criteria the PUC currently applies. The NGO representative and the senator emphasized the advantages of the siting process taking place at a localized level, especially given the time and expense required to travel to Montpelier for PUC proceedings. The representative of an NGO also said that the Act 250 processes are very good at gathering stakeholders affected by a proposed project. This stakeholder recommended that the PUC use the Act 250 infrastructure in establishing a pilot ADR program. All these stakeholders said that, in general, Act 250 is much more accessible and user friendly for members of the public.

On the other hand, another representative of a regional planning commission and an attorney firmly believed PUC should not adopt Act 250 procedures. The attorney felt the Act 250 procedures were not applicable to PUC processes, and the representative of the regional planning commission expressed concern with the power regions and towns have to stop Act 250 projects that could benefit the whole state or New England region.

The Act 174 Working Group recommended the PUC implement a mediation program similar to that used in Act 250 processes.²⁵⁹ In our research, we found that there is no mediation within the initial Act 250 processes. Mediation for Act 250 cases takes place if the case is appealed to the Environmental Division of the Vermont Judiciary.²⁶⁰ As the PUC is a quasi-judicial body as opposed to a fully judicial court, and as the PUC handles the initial stages of the siting process rather than appeals, we felt the mediation processes employed by the Environmental Division may not be very applicable to the PUC processes. However one attorney felt the screening procedure utilized in the Environmental Division to determine if mediation is appropriate for Act 250 appeals could be effective in PUC processes, particularly because the court's screens out cases involving intervenors who seek to block the project entirely. And in recommending a screening mechanism for the PUC, we relied heavily on reports analyzing the Environmental Division's screening process for Act 250 appeals.²⁶¹ The scoping meeting outlined in Recommendation 1 is also modeled on the initial Act 250 application process.

²⁵⁹ See *Act 174 Working Group Report*, *supra* at N.22, 7—8.

²⁶⁰ See *Mediation*, Vermont Judiciary, *supra* at N.219.

²⁶¹ See Recommendation 2 above.

Appendix 7: Example New York DPS Public Involvement Plan

Excerpt from PIP for Hectate Greene Solar Facility, October 2017²⁶²

PROPOSED PUBLIC INVOLVEMENT PLAN

The Co-Applicants' proposed PIP provides for communication with Host Municipalities, including the Town of Coxsackie and Greene County. The PIP will be made available at the document repositories listed in Section 5.1 above. The Siting Board's regulations provide that a PIP must include:

- consultation with the affected agencies and other stakeholders;
- pre-application activities to encourage stakeholders to participate at the earliest opportunity;
- activities designed to educate the public as to the specific proposal and the Article 10 review process, including the availability of funding for municipal and local parties;
- the establishment of a website to disseminate information to the public;
- notification; and
- activities designed to encourage participation by stakeholders in the certification and compliance process.

It is anticipated that this will be an ongoing, evolving process throughout all phases of the Article 10 review process (pre-application phase, application phase, hearing and decision phase, and post-certification phase), intended to disseminate information regarding the Facility to stakeholders, solicit information from those stakeholders during public outreach

²⁶² "Application of Hecate Energy Greene 1 LLC, Hecate Energy Greene 2 LLC, and Hecate Energy Greene 3 LLC for a Certificate of Environmental Compatibility and Public Need Pursuant to Article 10 of the Public Service Law for Construction of a Solar Electric Generating Facility Located in the Town of Coxsackie, Greene County," New York DPS, <http://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterCaseNo=17-F-0619&submit=Search> [accessed Dec. 3, 2017].

events, and generally foster participation in the Article 10 review. The Co-Applicants will establish a user-friendly website in plain English that describes the Facility (URL – to be provided). While still under initial development, this website will describe the Article 10 process and provide Facility updates throughout the development and construction phases of the Facility to keep the community informed of the Facility’s status (see Section 5.6 below for additional detail). To the greatest extent possible, Hecate Greene will use electronic communication, through email, email blasts and the like, to communicate with the Master List of Stakeholders. Where stakeholders request, US mail will be used.

CONSULTATION WITH THE AFFECTED AGENCIES AND MUNICIPALITIES

Affected agencies, listed above in Sections 3.1 and 3.2, were identified through review of the Article 10 regulations in consultation with the Facility’s permitting counsel and environmental consultant. Affected municipalities are identified in Sections 3.3 and 3.4 above. Consultation with affected agencies and municipalities will include the following general steps:

- The Co-Applicants will make initial contact with each agency or municipality to make certain they are aware of the Facility and inform them of the Article 10 process, including steps for intervenor funding, and provide information on who to contact with any questions or comments about the Facility and/or about the Article 10 process;
- Subsequent interaction with the agency or municipality, as needed, to answer specific questions or concerns about the Facility,
- Regular consultation with applicable agency staffs, as needed, during early development of the PSS; and
- Other specific consultations as required by the Siting Board’s rules, or as needed to inform the process.

With respect to intervenor funding, the Co-Applicants are required to deposit funds for intervenor participation. Funds are deposited with the DPS at the time the pre-application PSS is filed in an amount equal to \$350 for each 1,000 kilowatts (i.e., 1 MW) of generating capacity of the Facility, but no more than \$200,000. Pre-application funds are

dispersed to qualifying parties to aid in their participation in the scoping phase of this proceeding. Each request for pre-application funds are submitted to the presiding examiner assigned to the proceeding before the Siting Board, and at least 50% of the pre-application intervenor funds shall be reserved for potential awards to municipalities. Additional funds for intervenor participation will be deposited with the DPS at the time the Facility Application is filed in an amount equal to \$1,000 for each 1,000 kilowatts of capacity, but no more than \$400,000. Funds deposited with the Application may be used by parties for qualifying consultants and activities in the post-Application phase of the proceeding.

The goals of the initial consultation with each municipality or agency will be to consult with representatives, disseminate information, request information, and schedule follow-up meetings and/or consultations, as appropriate. Specific information provided to the affected agencies and municipalities will include a description of the Facility and location; explanation of the phases of the Article 10 process and how the agency or municipality can participate in each step; description of the available intervenor funding and the process for obtaining funding; description of the ad hoc committee process and local municipality responsibility; information about other planned consultations; and sources of additional information about the Facility and the Article 10 process (e.g., the Facility and Siting Board websites). Information to be requested from affected municipalities and agencies may vary by the involvement of each, but may include topics such as local ordinances and regulations, emergency response contacts and procedures, environmental impact review, and determination of news sources to be used for official notices.

It should be noted that in accordance with the Siting Board's regulations, public comments on the PSS are due within 21 days after filing with the Secretary to the Siting Board. The Co-Applicants intend to engage municipalities, agencies, and stakeholders throughout the PIP implementation process in order to identify their respective interests, and obtain information regarding particular resources, locations, concerns and recommendations of the affected communities, agencies, and interest groups. Prior to filing

the PSS, this will be accomplished through a variety of methods, including direct correspondence, review of comments submitted through the website, and targeted meetings with some of the individual stakeholders identified herein.

PRE-APPLICATION ACTIVITIES TO ENCOURAGE STAKEHOLDER PARTICIPATION

Through meetings with various State and local agencies, the Co-Applicants have been engaging in pre-application activities to encourage stakeholder participation (e.g., the Co-Applicants have held meetings with the New York State Historic Preservation Office, the Stockbridge-Munsee Mohican Tribal Historic Preservation Extension Office, and the Town of Coxsackie Supervisor).

In addition to the engagement activities that have already taken place, the Co-Applicants will continue pre-application activities to encourage stakeholder participation. The Meeting Log (Exhibit B) will be regularly updated each quarter as consultations and stakeholder participation activities take place, and additional means of engagement are identified (as necessary).

ACTIVITIES TO EDUCATE THE PUBLIC ON THE PROPOSAL, PROCESS, AND FUNDING

The Co-Applicants plan to attend one or more Town meetings, as appropriate, and is planning Co-Applicants sponsored public information sessions. The Co-Applicants will be distributing educational materials, and will provide a Facility website that will offer information on the proposed Facility, as well as links to and information on the Article 10 process, intervenor funding, and other important stakeholder issues. These efforts will allow the Co-Applicants to engage with stakeholders regarding the proposed Facility and will offer multiple avenues of information distribution so that stakeholders and the public have multiple, varied opportunities to obtain information on the Facility and participate in the proceedings. These efforts are further detailed below.

Public Meetings

Hecate Greene intend to hold open-house-style public meetings prior to submittal of the PSS and meetings following submittal of the Application. The meetings will likely be held at different times on the same day. Representatives for Hecate Greene will be present to provide Facility information and answer questions. It is anticipated that these meetings will be held at a public meeting space in reasonable proximity to the Facility Area. Public meetings will be announced through public notices in local newspapers, including The Register Star and The Daily Mail, in advance of the scheduled events. Hecate Greene will also mail notices of the Co-Applicants-sponsored public meetings to adjacent property owners. Notification of all public meetings held by Hecate Greene will also be mailed or emailed to the Master Stakeholders List in Exhibit A and updated as public engagement proceeds. Additional stakeholders will be added to this list as they are obtained through the initial public meetings and Facility website. The updated list will then be used for future mail and email notifications and the list will be further updated based on additional requests. In addition, all meeting announcements will be posted on the Facility website (URL – to be provided). Hecate Greene will provide DPS Staff with informal notice of all scheduled public meetings.

[...]

NOTIFICATIONS

The Siting Board's regulations establish the notification requirements for serving documents. Hecate Greene will publish all required notices in The Register Star and The Daily Mail and will also provide notice in accordance with standard notice requirements for actions of the Town of Coxsackie. No less than three days prior to filing the PSS and the Application, the Co-Applicants will: publish notice of the PSS and the Application in the newspapers listed above; serve each member of the State Legislature in whose district any portion of the proposed Facility is to be located; provide written notice to those persons who have filed a statement with the Secretary within the past 12 months that wish to receive such

notices; and provide mail and email (if available) notification to all parties on the Master Stakeholder List. In addition, notifications will be posted on the Facility website. The Co-Applicants will publish any other notices required by the Presiding Examiner or other section of Article 10 in the manner prescribed by the Presiding Examiner or under the procedures contained in Article 10.

ACTIVITIES TO ENCOURAGE STAKEHOLDER PARTICIPATION

The activities described above in Sections 5.1 through 5.7 will seek to encourage stakeholder participation during the certification process. It is anticipated that this will be an ongoing, evolving process throughout all phases of the Article 10 review process (pre-application phase, application phase, hearing and decision phase, and post-certification phase). The Co-Applicants will track the PIP and provide regular quarterly (or more often upon request) updates to DPS Staff. Specifically, the Co-Applicants will maintain a Meeting Log (Exhibit B) that will provide relevant summaries of meetings, including dates, locations, attendees, purpose, and applicable discussion topics.

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